S. HRG. 98-905

CONGRESSIONAL REVIEW OF AGENCY RULES

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

AN AMENDMENT TO SECTION 13 OF S. 1080, THE REGULATORY REFORM ACT, TO PROVIDE FOR CONGRESSIONAL REVIEW OF AGENCY RULES

FEBRUARY 8, 1984

Serial No. J-98-93

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
35-646 O WASHINGTON : 1984

5521-61

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

Vinton DeVane Lide, *Chief Counsel and Staff Director*
Deborah K. Owen, *General Counsel*
Deborah G. Bernstein, *Chief Clerk*
Mark H. Gitenstein, *Minority Chief Counsel*

Subcommittee on Administrative Practice and Procedure

CHARLES E. GRASSLEY, Iowa, *Chairman*

PAUL LAXALT, Nevada
ARLEN SPECTER, Pennsylvania

HOWELL HEFLIN, Alabama
MAX BAUCUS, Montana

Lynda L. Nersesian, *Chief Counsel and Staff Director*
Alice R. Milder, *General Counsel*

CONTENTS

Statements of Members

Page
Grassley, Senator Charles E. (opening) 1
Helfin, Senator Howell 9, 10
Thurmond, Senator Strom 28

Chronological List of Witnesses

Levin, Hon. Carl, a U.S. Senator from the State of Michigan 29
Broyhill, Hon. James, a U.S. Representative from the State of North Carolina; and Hon. Elliott Levitas, a U.S. Representative from the State of Georgia 44
DeMuth, Christopher, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget; and Loren A. Smith, Chairman, Administrative Conference of the United States 86
Douglas, Sally L., manager of research, National Federation of Independent Business; Jeff Perlman, council on administrative law, U.S. Chamber of Commerce; Dick Patterson, chairman, regulatory reform subcommittee, National Association of Manufacturers; and Cornelius Kennedy, attorney at law, Washington, DC 137

Alphabetical List and Submitted Material

Broyhill, Representative James:
    Testimony 44
    Prepared statement 47
    Memorandum, "The Impact of Joint Resolution of Approval of Agency Rules on Judicial Review of Approved Rules," by Richard Ehlke, of Congressional Research Service 53
DeMuth, Christopher:
    Testimony 86
    Prepared statement 91
    Major final rules reviewed under Executive Order 12291 100
    Responses to questions of Senator Grassley 125
Douglas, Sally L.:
    Testimony 137
    Prepared statement 139
    Responses to questions of Senator Grassley 148
Grassley, Senator Charles E.:
    Comments and a copy of the amendment to section 13 of S. 1080, from Congressional Record, November 18, 1983 4
    Prepared statement of Representative Trent Lott 40
Heflin, Senator Howell:
    Prepared statement 10
    "The Legislative Veto After *Chadha*," lecture, by Stephen Breyer, from the Georgetown Law Journal, vol. 72:785, 1984 14
Kennedy, Cornelius: Testimony 156
Levin, Senator Carl: Testimony 29
Levitas, Representative Elliott H.:
    Testimony 58
    Prepared statement 61
    "With the Veto Gone," article by Robert E. Litan and William D. Nordhaus, from the New York Times, July 5, 1983 70
    Letters to the White House and elicited responses 71

Page

Levitas, Representative Elliott H.—Continued
    Remarks at Georgetown University symposium on legislative veto, October 13, 1983 77
Patterson, Dick:
    Testimony 149
    Prepared statement of National Association of Manufacturers 151
    Responses to questions of Senator Grassley 155
Perlman, Jeff: Testimony 149
Smith, Loren A.:
    Testimony 127
    Prepared statement 132
    Responses to questions of Senator Grassley 135

CONGRESSIONAL REVIEW OF AGENCY RULES

WEDNESDAY, FEBRUARY 8, 1984

U.S. Senate,
Subcommittee on Administrative Practice
and Procedure, Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Present: Senators Heflin and Specter.

Staff present: Lynda L. Nersesian, chief counsel and staff director; Alice R. Milder, general counsel; and Veronica Gonzales, legislative aide.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator **Grassley**. At this time I would like to call this hearing of the Subcommittee on Administrative Practice and Procedure to order.

We are here to receive testimony on the amendment which Senator Heflin and I are proposing for S. 1080, the regulatory reform bill, to provide for congressional review of agency regulations.

As most of you know, the Supreme Court decision last summer invalidated one-house and two-house vetoes of agency regulations primarily because they were not to be presented to the President for his signature. This scheme of review had become very popular in recent years and appears in various forms in over 200 statutes now in effect.

Since the time of the *Chadha* decision we have been searching for a workable system to enable Congress to restrain the legislative power we've delegated to the agencies. My conclusion is that Congress must accept responsibility for enacting into law at least those rules which will have $100 million or more impact on the economy or that have serious effects on more intangible factors, such as the environment, productivity, and competition.

Consequently, Senator Heflin and I, along with a majority of the Judiciary Committee members, have proposed an amendment to section 13 of S. 1080, which now contains an unconstitutional procedure for disapproving agency rules, and that is unconstitutional because of the *Chadha* decision. The amendment requires that Congress pass and the President sign a joint resolution of approval before any major rule can become effective.

The major rule designation is already well defined in S. 1080. A joint resolution of disapproval is also available and hence an alternative for all other rules. Under our amendment, all proposed final rules are submitted to Congress within a 90-day waiting period during which appropriate resolutions would be passed.

Expedited procedures insure that no single member or group could block the will of the majority or delay consideration. Of the estimated 200 statutes currently containing some form of legislative veto, only 27 have been identified by the Department of Justice as dealing with rulemaking activities.

As presently drafted, this proposed amendment would not affect all other laws which the *Chadha* decision has called into question. At least these few could be cleared up by enacting S. 1080 with our joint resolution of approval, disapproval mechanism. In fact, the end result of our approval procedure is very close to the result of a one-house veto. If one House of Congress disapproves of a rule, it does not become effective. As a matter of policy, Congress has already decided that 13 of these regulatory authorizations shall be subjected to the possibility of a one-house veto. A joint resolution of approval does not change this policy decision.

A joint resolution of disapproval, on the other hand, changes the focus of congressional review and downgrades the likelihood that Congress will reject a proposed rule. Congress bears the ultimate responsibility for regulatory programs. We, all of us in the Congress, are elected to make these difficult decisions and we should not pass them on to nameless bureaucrats in order to avoid that responsibility.

We should be able to provide more specific guidance in statutes creating these agencies in our budget and appropriations process and in our general function of legislative oversight.

This goal will be largely accomplished by the adoption of a comprehensive legislative review mechanism. In addition, we must also enact into law procedures that require careful analysis of proposed regulations with ample opportunity for public input.

Congress received the President's budget message last Wednesday. In it he described the improved prospects for the Nation's economy as a result of policies to streamline the scope of government and simplify or eliminate burdensome regulations. Early in this administration Executive Order 12291 instituted new procedures for executive agencies to follow in their rulemaking activities. These were designed to make new rules as cost effective as possible and to screen out hundreds of ill-conceived proposals that would require massive expenditures in the private sector for very little public gain.

There is no doubt that these policies have contributed much to the economic recovery we're now experiencing. However, we must be aware how easily this situation could be reversed at some time in the future when the Nation's leaders may have different priorities. Not all public servants have a good understanding of the burden overregulation places upon our free enterprise system.

The President's budget message already referred to insists that these improvements be enacted into law. Of course, I could not agree more. And his strong statement on regulatory reform says this, and I would like to quote a paragraph:

"Individual regulatory decisions will always be contentious and controversial, but surely we can all agree on the general need for regulatory reform. Making each Government rule as cost effective as possible benefits everyone, and it strengthens the individual regulatory statutes. Regulation has become such an important role of the Federal Government that strong and balanced central oversight is becoming a necessity and a bipartisan objective. The Laxalt-Leahy Regulatory Reform Act which passed the Senate unanimously in 1982," the President says, "would have accomplished this reform."

And then the President goes on to state in the last sentence: "I strongly urge the Congress to take up and pass similar legislation this year."

I am pleased that President Reagan has taken this means to express support for the Regulatory Reform Act that Senator Heflin and I reintroduced early this year exactly as it passed the Senate in March 1982 by a vote of 94 to zero.

With more than half the Senate listed as cosponsors, we expect this bill, S. 1080, to be considered soon after the February recess.

[Senator Grassley's comments and a copy of the amendment to section 13 of S. 1080 follow:]

LEGISLATIVE REVIEW OF AGENCY REGULATIONS

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 98th CONGRESS, FIRST SESSION

Vol. 129 WASHINGTON, FRIDAY, NOVEMBER 18, 1983 No. 161—Part III

Senate

AMENDMENT PROPOSED BY SENATOR GRASSLEY AND SENATOR HEFLIN AND OTHERS, TO S. 1080, THE "REGULATORY REFORM ACT", TO PROVIDE A CONSTITUTIONAL METHOD FOR CONGRESSIONAL REVIEW OF AGENCY RULEMAKING.

Mr. GRASSLEY. Mr. President,

The language now in S. 1080 calls for congressional review of any agency's proposed regulations, with provisions for a concurrent resolution of disapproval for rules that Congress finds objectionable. This procedure the Supreme Court has found to be unconstitutional, but it does not alter or dilute the original rationale which brought the legislative veto into use in the first place. The issue is still "who shall write the laws of the land?" As Chief Justice Burger stated in handing down the Chadha decision, efficiency is a lesser value in a free society than liberty. But I believe all of us would agree that efficiency in Government is desirable. The Founding Fathers, writing when the United States was small and life was much more simple, were concerned chiefly with excessive power in the Executive, but they were certainly aware of the need to divide and disperse power in order to protect liberty. As a result they gave us liberty-by-conflict; legislation requires the concurrence of a majority of both Houses of Congress, but the President is given a qualified power to nullify proposed legislation by veto.

The painfully literal reading of Article I powers by the Court does not help to resolve the endless, inconclusive wrangling over major issues between the executive and legislative branches. The congressional veto was a compromise which allowed effective and accountable decisions that the public could understand, and operated to everyone's advantage.

Since we can no longer recall inadvertent regulatory actions by simple agreement of both Houses of Congress, we are now faced with the need to exercise more control in the original delegation of legislative power to agencies. The real challenge in American Government today is not the runaway exercise of power by the President; it is the irresponsible exercise of power by unelected bureaucrats in numberless agencies making rules that have the force of law, without the political or economic accountability that the Founding Fathers intended for our Government to have.

I believe that in the long run this is what regulatory reform is all about. Surely we need to have regulation in many areas, setting national standards for the protection of our workers, our environment, and the public in general. Many of us feel that a new view of the role of the courts is also in order, but most important is that the voice of the American people be heard in as direct a manner as possible. As Senator Harrison Schmitt said during the floor debate on S. 1080:

> The public does not express itself through the courts, not does it speak through the executive branch on the multiplicity of rulemaking issues and legislative issues that the Congress must oversee. It is the Congress that fills this role, and it is the Congress that must have the power to overturn proposed rules if we are to have permanent regulatory reform.

The congressional veto concept is as vital to our governing process now as it was prior to Chadha. Senator HEFLIN and I are now offering an amendment to S. 1080, the regulatory reform bill to replace the unconstitutional concurrent resolution of disapproval with a joint resolution of approval for major rules, and a joint resolution of disapproval for all other rules. Both of these processes would be on a 90-day report-and-wait schedule, with expedited procedures for discharge from committees of jurisdiction and for floor consideration. This proposal has the support of a majority of the members of the Senate Committee on the Judiciary and I would like to take a moment to commend committee members for their able leadership in the area of legislative veto and regulatory reform. Senator **Heflin** has been very supportive of this entire effort and I greatly appreciate his help and friendship. Chairman **Thurmond** has doggedly pursued these reform proposals for many years and Senators **Laxalt** and **Leahy** led the effort last Congress and remain strong advocates of regulatory reform. In addition Senators **Roth** and **Eagleton** have shepherded regulatory reform legislation in the past through the Committee on Government Affairs and continue to be supporters of the concept.

Some have expressed concern that such a requirement would create an impossible work load for Congress and its staff, but if limited to major rules—as defined in S. 1080—the intensive review should cover no more than 40 or 50 proposals a year. Most of the several thousand other rules would go into effect with only a cursory review by the Congress. If we do not have such a system, we will be faced with writing much more detailed legislation initially, to provide more specific standards and policy directives to the agencies in the original delegation. This would be a substantial burden too, one which we have not been willing to undertake in the past, and which would not make adequate use of the agency's expertise in its own field.

If 535 Members of Congress and our thousands of staff people cannot take time to examine substantive obligations being placed on the citizens of this country, some with severe economic and even criminal sanctions, then something is terribly wrong. Is it fair to ask a small businessman to comply with a regulation which we claim we don't even have time to read?

It may not be appropriate to have one generic solution to all the current statutes which provide for legislative veto, but it does seem reasonable that all agency rules should be subjected to the same congressional review procedures. We are not affecting the War Powers Act, the budget process, or foreign arms sales by this amendment; those are being dealt with on a case-by-case basis. The policies behind those vetoes are unique. By separating out major rules for congressional scrutiny we will be retaining effective control over regulatory actions, and fulfilling our constitutional role of legislation by a majority of the elected representatives of the people. The American people deserve no less.

I ask unanimous consent that a summary be printed in the **Record**.

There being no objection, the summary was ordered to be printed in the **Record**, as follows:

Summmary of Senator Grassley's Congressional Review Amendment to S. 1080

This proposal is drafted as a replacement for Section 13 of S. 1080, the Regulatory Reform Act, and makes use of all other sections of that bill already in place. The present procedure for Congressional review of agency rules involves a concurrent resolution for disapproval, which was ruled unconstitutional as a means of correcting regulatory actions.

Most rules of general applicability are to be submitted to Congress for a 90-day review period. They are referred to the committee of primary jurisdiction, or to an ad hoc committee appointed by the presiding officer of the respective House if there is more than one standing committee involved. The tight time schedule precludes joint or sequential referral.

Under Senator Grassley's proposal, major rules will not take effect unless a joint resolution is passed approving the proposed rule within the 90-day period. The resolution would be introduced by the committee chairman (by request) immediately upon referral of the proposed rule. An agency could not propose the same rule for two years, but could offer an amended version based on the same record plus the changes suggested by the previous congressional consideration. This would also be subject to the review process.

All other rules are similarly referred, but subject to a joint resolution of disapproval which may be introduced by any Member. Such a rule may take effect after 75 days if neither House has completed action on such a resolution, or if either House has rejected a resolution of disapproval.

Emergency rules may be made effective immediately under strict findings of necessity (already found in S. 1080) but limited to 120 days unless the congressional review procedures have been initiated.

Discharge of a committee from consideration of an appropriate resolution may occur 30 days after referral, and is automatic after 45 days in the case of major rules. A motion to discharge a committee is in order when signed by one-fourth of the Members, and the resolution is immediately placed on the appropriate calendar of the House involved.

A motion to proceed to consideration of such a resolution would be in order at any time thereafter; it would be privileged with debate limited to two hours. If one House receives a resolution from the other House and has not reported or been discharged of its own resolution within 75 days after referral of a rule, the resolution of the other House would immediately be placed on the appropriate calendar.

GRASSLEY (AND OTHERS) AMENDMENT NO. 2655

Mr. GRASSLEY (for himself, Mr. **Heflin**, Mr. **Thurmond**, Mr. **Laxalt**, Mr. **DeConcini**, Mr. **Hatch**, Mr. **Dole**, Mr. **Simpson**, Mr. **East**, Mr. **Denton**, and Mr. **Specter**) proposed an amendment to the bill (S. 1080) to amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs, to provide for a periodic review of regulations, and for other purposes; as follows:

On page 55, beginning with line 1, strike out through line 2 on page 66 and insert the following:

CONGRESSIONAL REVIEW

SEC. 13. (a) Title 5, United States Code, is amended by inserting immediately after chapter 7 the following new chapter:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

"Sec.
"801. Definitions.
"802. Applicability.
"803. Congressional review of agency rules.
"804. Committee consideration of appropriate resolutions.
"805. Floor consideration of appropriate resolutions.
"806. Computation of calendar days of continuous session.
"807. Effect of adjournment sine die.
"808. Effect on judicial review.

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

"§ 801. Definitions

"For purposes of this chapter—

"(1) the term 'agency' has the same meaning as in section 551(1) of this title;

"(2) the term 'rule' means a rule subject to section 553 of this title;

"(3) the term 'major rule' has the same meaning as in section 621(4) of this title;

"(4) the term 'emergency rule' means a rule which is promulgated pursuant to a finding by the agency under section 553(b)(2) of this title;

"(5) the term 'promulgate' means to file a proposed rule with the Office of the Federal Register for publication;

"(6) the term 'appropriate committee' means—

"(A) the committee of the House of the Representatives or the committee of the Senate which has primary legislative jurisdiction over the statute under which a rule is promulgated, or over the agency which has promulgated a rule; or

"(B) in any case in which more than one committee of the Senate or the House of Representatives has primary legislative jurisdiction over such a statute or such an agency, a special ad hoc committee appointed by the presiding officer of the Senate or of the House of Representatives, as the case may be, with the approval of the respective House, from the membership of such committees of primary legislative jurisdiction; and

"(7) the term 'appropriate resolution' means—

"(A) in the case of a major rule, a joint resolution, the matter after the resolving clause of which is as follows: 'That the Senate and the House of Representatives approve the rule entitled   , transmitted to the Congress by   , on   .', the first blank being filled with the title of the rule, the second blank being filled with the name of the agency promulgating the rule, and the third blank being filled with the date of transmittal of the rule to the Congress; and

"(B) in the case of a rule which is not a major rule, a joint resolution, the matter after the resolving clause of which is as follows: 'That the Senate and the House of Representatives disapprove the rule entitled   transmitted to the Congress by   on   .', the first blank being filled with the title of the rule, the second blank being filled with the name of the agency promulgating the rule, and the third blank being filled with the date of transmittal of the rule to the Congress.

"§ 802. Applicability

"Except as provided in section 803(c) of this title, the provisions of this chapter do not apply to—

"(1) any rule for which an agency makes a finding under section 553(b)(3) of this title;

"(2) any rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; and

"(3) any emergency rule if—

"(A) the head of the agency determines that the rule is being issued in response to an emergency situation or other exceptional circumstances requiring immediate agency action in the public interest; and

"(B) on the date on which the agency promulgates the rule, the head of the agency submits to the chairmen and ranking minority members of the appropriate committees a written notice specifying the reasons for the determination of the agency under subparagraph (A) of this paragraph and under section 553(b)(2) of this title.

"§ 803. Congressional review of agency rules

"(a)(1) If an agency promulgates a rule which is subject this chapter, such rule shall be considered only a recommendation of the agency to the Congress and shall have no force and effect as a rule unless such rule has become effective in accordance with this chapter.

"(2) On the first day on which both Houses of Congress are in session after the date on which an agency promulgates a rule, the agency shall transmit a copy of the rule to the Secretary of the Senate and the Clerk of the House of Representatives.

"(b) (1) A major rule may not take effect unless an appropriate resolution approving such rule is enacted within 90 calendar days of continuous session of Congress after the date on which the major rule is transmitted to the Congress under subsection (a)(2) of this section.

"(2)(A) Except as provided in subparagraph (B) of this paragraph, a rule which is not a major rule may not take effect if, within 90 calendar days of continuous session of Congress after the date on which the rule is transmitted to the Congress, an appropriate resolution is enacted disapproving the rule.

"(B) A rule which is not a major rule may take effect—

"(i) at any time after 75 calendar days of continuous session of Congress after the date on which the rule is transmitted to the Congress under subsection (a)(2) of this section if, within such 75-day period, neither House of Congress has completed action on an appropriate resolution with respect to the rule; and

"(ii) at any time after either House of Congress rejects an appropriate resolution with respect to the rule.

"(c) Notwithstanding any other provision of law, unless earlier withdrawn by the agency or earlier set aside by judicial action, an emergency rule described in section 802(3) of this title shall not be in effect at any time after 120 calendar days after the date on which the rule is promulgated unless the agency promulgates such rule and transmits such rule under subsection (a)(2) of this section.

"(d) If a rule which was promulgated subject to a statutory time limit for rule making does not become effective under this chapter, the statutory time limit shall apply to any rule making with respect to the same subject matter as the rule which did not become effective under this chapter, and such time limit shall begin on the date that such rule was prevented from becoming effective under this chapter.

"(e)(1) If, under this chapter, a rule did not become effective, an agency may not, for a period of two years beginning on the date on which such rule was prevented from becoming effective under this chapter, promulgate a rule which is substantially the same as the rule which did not become effective under this chapter.

"(2) Subject to paragraph (1), an agency may promulgate a rule relating to the same subject matter as a rule which did not become effective under this chapter. Such rule may be based in whole or in part on the rule making record of the rule which did not become effective under this chapter, and may reflect such changes as the agency considers appropriate in light of congressional consideration of the rule which did not become effective under this chapter. Any rule which is promulgated with respect to the same subject matter as a rule which did not become effective under this chapter shall be subject to this chapter.

"§ 804. Committee consideration of appropriate resolutions

"(a)(1) The chairman of an appropriate committee with respect to a major rule, or a Member designated by the chairman, shall introduce (by request) an appropriate resolution with respect to such major rule no later than the first day of the session after the date on which the rule is transmitted to the Congress under section 803(a)(2) of this title.

"(2) Any appropriate resolution introduced in the Senate or the House of Representatives with respect to a major rule shall be immediately referred to the appropriate committee.

"(3) Not later than 45 calendar days of continuous session of Congress after the date on which a major rule is transmitted to the Congress, an appropriate committee shall review the major rule and shall report to the Senate or the House of Representatives, as the case may be, an appropriate resolution with respect to such rule and the recommendations of the committee as to whether such resolution should be adopted or rejected.

"(4) If an appropriate committee has not reported an appropriate resolution with respect to a major rule within the 45-day period described in paragraph (3), the committee shall be deemed to be discharged from further consideration of the resolution, and the resolution shall be placed on the appropriate calendar of the House of Congress involved.

"(b)(1) Any appropriate resolution introduced in the Senate or the House of Representatives with respect to a rule which is not a major rule shall be immediately referred to the appropriate committee.

"(2) If an appropriate committee has not reported an appropriate resolution with respect to a rule which is not a major rule within 30 calendar days of continuous session of Congress after the date such resolution is referred to such committee, it shall be in order to move to discharge the committee from consideration of such resolution.

"(c) If an appropriate committee of the Senate or the House of Representatives to which has been referred an appropriate resolution transmitted from the other House with respect to any rule does not report such appropriate resolution within 20 calendar days of continuous session of Congress after transmittal of such resolution from the other House, it shall be in order to move to discharge that committee from further consideration of such resolution.

"(d) Any motion to discharge under subsection (b)(2) or subsection (c) of this section must be supported in writing by one-fourth of the Members, duly chosen and sworn, of the House of Congress involved, and is highly privileged in the House and privileged in the Senate (except that it may not be made after an appropriate resolution has been reported with respect to the same rule), and debate thereon shall be limited to not more than one hour, the time to be divided in the House of Representatives equally between those favoring and those opposing the motion to discharge and to be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order.

"(e) Whenever an appropriate committee reports an appropriate resolution with respect to any rule pursuant to this chapter, the appropriate resolution shall be accompanied by a committee report which includes the text of the rule, the agency's explanation of the rule, and the committee's reasons for recommending the adoption or rejection of the appropriate resolution. The appropriate resolution reported shall immediately be placed on the appropriate calendar of the House involved.

"§ 805. Floor consideration of appropriate resolutions

"(a) Except as otherwise provided in this section, consideration of an appropriate resolution shall be in accord with the rules of the Senate and the House of Representatives, respectively.

"(b) When a committee of the Senate or the House of Representatives has reported or has been discharged from further consideration of an appropriate resolution, or when an appropriate resolution from one House of Congress has been placed on the calendar of the other House of Congress, it shall be in order, notwithstanding the provisions of rule XXII of the Standing Rules of the Senate or any other rule of the Senate or the House of Represenatives, at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the immediate consideration of either such resolution. The motion is highly privileged in the House and privileged in the Senate and is not debatable. An amendment to the motion is not in order.

"(c)(1) Except as provided in paragraph (2) of this subsection, debate on an appropriate resolution shall be limited to not more than 2 hours, which shall be divided in the House of Representatives equally between those favoring and those opposing the resolution and which shall be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. A motion further to limit debate is not in order.

"(2) If the Senate or the House of Representatives has debated the appropriate resolution of its House with respect to a rule, an appropriate resolution of the other House with respect to the same rule is not debatable.

"(3) An amendment to, or motion to recommit, an appropriate resolution is not in order.

"(4) A motion to reconsider an appropriate resolution shall be in order only on the day on which occurs the vote on adoption of the resolution, and shall not be debatable.

"(5) Any other motions with respect to an appropriate resolution shall be decided without debate.

"(d)(1) If, before the adoption by one House of Congress of an appropriate resolution with respect to a rule, that House receives an appropriate resolution with respect to the same rule from the other House, and less than 75 calendar days of continuous session of Congress have elapsed since the rule was transmitted to the Congress under section 802(a)(2) of this title, the appropriate resolution from the other House shall be referred to the appropriate committee of the first House. If, after such 75-day period has expired, such appropriate committee has not reported such appropriate resolution, such appropriate committee shall be deemed to be discharged from further consideration of such appropriate resolution, and such appropriate resolution shall be placed on the appropriate calendar of the House involved.

"(2) If, before the adoption by one House of the Congress of an appropriate resolution with respect to a rule, that House receives an appropriate resolution with respect to the same rule from the other House and at least 75 calendar days of continuous session of Congress have elapsed since the rule was transmitted to the Congress under section 802(a)(2) of this title, the appropriate resolution from the other House shall immediately be placed on the appropriate calendar of the first House.

"(e) If prior to the adoption by either House of Congress of an appropriate resolution with respect to a rule, an appropriate resolution with respect to such rule is received from the other House, the vote on final passage shall occur on the appropriate resolution from the other House.

"(f) The provisions of this section and sections 801(7), 803, and 804 of this title are enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of appropriate resolutions; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"§ 806. Computation of calendar days of continuous session

"For purposes of this chapter—

"(1) continuity of session is broken only by an adjournment sine die at the end of a Congress;

"(2) the days on which either House is not in session because of an adjournment or recess of more than three days to a day certain shall be excluded in the computation of days of continuous session; and

"(3) the days in the period beginning on the date on which the Congress completes action on an appropriate resolution and ending on the date on which the appropriate resolution is approved or disapproved by the President shall be excluded from the computation of days of continuous session.

"§ 807. Effect on adjournment sine die

"(a) If an adjournment sine die of a Congress occurs before the expiration of a period of 90 calendar days of continuous session of Congress after the date on which a major rule is transmitted to the Congress under section 80(a)(2) of this title, the major rule shall not become effective during that Congress, and an agency may transmit the major rule to the succeeding Congress in accordance with this chapter.

"(b) If an adjournment sine die of a Congress occurs before the expiration of a period of 30 calendar days of continuous session of Congress since the date on which a rule which is not a major rule is transmitted to the Congress under section 803(a)(2) of this title, such rule shall not become effective during that Congress, and an agency may transmit such rule to the succeeding Congress in accordance with this chapter.

"§ 808. Effect on judicial review

"(a) Congressional inaction on or rejection of an appropriate resolution shall not be deemed an expression of approval or disapproval of a rule.

"(b) The enactment of an appropriate resolution approved a major rule shall not be construed to create any presumption of validity with respect to such rule, and shall not affect the judicial review of the rule under chapter 7 of this title.".

Senator Grassley. At this time I would like to ask my friend and colleague, the ranking minority member of this subcommittee, Senator Heflin, for any opening statement he might have.

STATEMENT OF SENATOR HOWELL HEFLIN

Senator Heflin. Mr. Chairman, I would like to thank you for your interest and leadership in pursuing appropriate solutions for this very important constitutional issue. I request that the remaining part of my statement be submitted for the record.

Senator Levin is here and other witnesses and we can move on to more substantive matters.

Senator Grassley. Well, I enjoy listening to you. We will read your statement, which will be in the record. Thank you for your attendance and particularly for a previous hearing that we had on this very subject, for your attention to that throughout the entire hearing.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

TODAY THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE IS AGAIN FOCUSING ITS ATTENTION ON DEVELOPING AN APPROPRIATE LEGISLATIVE VETO MECHANISM IN LIGHT OF THE UNITED STATES SUPREME COURT DECISION IN IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA. IN CHADHA, THE COURT DECLARED THE EXISTING LEGISLATIVE VETO UNCONSTITUTIONAL. I WOULD LIKE TO THANK THE DISTINGUISHED CHAIRMAN OF THE SUBCOMMITTEE, SENATOR GRASSLEY FOR HIS INTEREST AND LEADERSHIP IN PURSUING APPROPRIATE SOLUTIONS TO THIS IMPORTANT CONSTITUTIONAL ISSUE.

THE FRAMERS OF OUR CONSTITUTION BELIEVED THAT THE LEGISLATIVE, EXECUTIVE AND JUDICIAL FUNCTIONS SHOULD BE EXERCISED BY ENTIRELY SEPARATE AND DISTINCT BODIES. THUS, WE HAVE THE SEPARATION OF POWERS DOCTRINE, WHICH PROVIDES THE BASIC FRAMEWORK FOR OUR FEDERAL GOVERNMENT.

IN MODERN HISTORY, HOWEVER, THE FINE LINES OF DEMARCATION BETWEEN OUR THREE BRANCHES OF GOVERNMENT HAVE ERODED. AS MORE COMPLEX LEGISLATION BECAME NECESSARY, CONGRESS RESPONDED BY DELEGATING BROAD POWERS TO THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES TO IMPLEMENT THE GENERAL POLICIES EMBODIED IN ITS LEGISLATION. IN THESE BROAD STATUTES, CONGRESS DELEGATED THE RESPONSIBILITY FOR DECISIONS OF GREAT SIGNIFICANCE WHICH WILL

AFFECT THE LIVES OF MANY AMERICANS. YET, IN ORDER TO RETAIN ITS ULTIMATE POWER AS "LAW MAKER", CONGRESS RELIED EXTENSIVELY ON THE LEGISLATIVE VETO.

IN FACT, SINCE 1932, ABOUT 210 LAWS CONTAINING OVER 300 VETO PROVISIONS HAVE BEEN ENACTED, MOST WITHIN THE LAST DECADE -- A DECADE IN WHICH CONGRESS REASSERTED ITS AUTHORITY IN AREAS SUCH AS THE BUDGET ACT, THE WAR POWERS ACT, AND THE AMERICAN EXPORT CONTROL ACT.

IN INS V. CHADHA, THE SUPREME COURT DECLARED THESE VETO PROVISIONS UNCONSTITUTIONAL. IN ESSENCE, THE COURT SAID THAT THE CONSTITUTION, IN ARTICLE I, SECTIONS 1 & 7, REQUIRE "A SINGLE, FINELY WROUGHT AND EXHAUSTIVELY CONSIDERED PROCEDURE": BOTH HOUSES MUST APPROVE A BILL AND SUBMIT IT FOR THE PRESIDENT'S SIGNATURE.

TODAY, BECAUSE OF THE CHADHA DECISION, WE AGAIN EXAMINE THE FUNDAMENTAL PROBLEM THAT THE LEGISLATIVE VETO WAS DESIGNED TO MEET: WHAT METHOD DOES CONGRESS ADOPT TO RETAIN APPROPRIATE CHECKS OVER ACTIONS WHICH ARE THEMSELVES BASED UPON PRIOR STATUTORY DELEGATION OF AUTHORITY?

AN EXAMINATION OF THE CONGRESSIONAL RESPONSE INDICATES A VARIETY OF STATUTORY AND NON-STATUTORY MECHANISMS DESIGNED TO

ACCOMPLISH THE LEGISLATIVE VETO FUNCTION. YET, IT IS MY HOPE THAT AS CONGRESS FORMULATES A RESPONSE TO THIS PROBLEM, WE WILL GO BEYOND SHORT-TERM, AD HOC, PROPOSALS, TO CONSIDER LONG-TERM INSTITUTIONAL APPROACHES TO PRESERVE THE MANDATES OF OUR CONSTITUTION AND YET PROMOTE THE EFFECTIVENESS OF OUR GOVERNMENT.

ONE ALTERNATIVE UNDER CONSIDERATION IS AN AMENDMENT PROPOSED BY OUR CHAIRMAN, SENATOR GRASSLEY, AS AN AMENDMENT TO S. 1080, WITH A JOINT RESOLUTION OF APPROVAL FOR "MAJOR RULES" AND JOINT RESOLUTIONS OF DISAPPROVAL FOR ALL OTHER RULES. BOTH OF THESE PROCESSES WOULD BE ON A 90-DAY REPORT-AND-WAIT SCHEDULE, WITH EXPEDITED PROCEDURES FOR DISCHARGE FROM COMMITTEES OF JURISDICTION AND FLOOR CONSIDERATION.

I AM SUPPORTIVE OF THIS CONCEPT. HOWEVER, I DO BELIEVE THAT WE SHOULD CONTINUE TO CAREFULLY CONSIDER ALL OF THE PROPOSED ALTERNATIVES TO THE LEGISLATIVE VETO TO DEVELOP AN EFFICIENT, PRACTICAL LONG-TERM RESPONSE THAT WILL PASS CONSTITUTIONAL MUSTER.

THERE NEEDS TO BE, AND THE PUBLIC WANTS, A SYSTEM OF CHECKS AND BALANCES THROUGH THE POLITICAL PROCESS BY WHICH THE POLITICALLY UNACCOUNTABLE BUREAUCRATS OF THE AGENCIES AND EXECUTIVE BRANCH CAN BE APPROPRIATELY MONITORED. AND YET, WE CANNOT ALLOW A NEW

METHOD OF CONGRESSIONAL CONTROL TO BOG US DOWN IN THE DELUGE OF FEDERAL RULES AND REGULATIONS.

THIS IS THE TASK BEFORE US. IT IS A TALL ORDER, AND I AM PROUD TO BE PART OF THIS ENDEAVOR.

I WOULD LIKE TO WELCOME THE WITNESSES HERE TODAY, AND I LOOK FORWARD TO HEARING THEIR THOUGHTFUL STATEMENTS AND COMMENTS. I WOULD ALSO LIKE TO SUBMIT FOR THE RECORD A COPY OF A LECTURE DELIVERED BY STEVEN BREYER, WHO WAS FORMERLY CHIEF COUNSEL OF THE SENATE JUDICIARY COMMITTEE, AND WHO IS CURRENTLY SERVING ON THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT. STEVEN BREYER HAS DEVOTED CONSIDERABLE TIME IN STUDYING THE FUNCTION AND FUTURE OF THE LEGISLATIVE VETO. THIS LECTURE, GIVEN ON OCTOBER 13, 1983, AT GEORGETOWN UNIVERSITY LAW CENTER, REFLECTS HIS THOUGHTS SINCE THE CHADHA DECISION.

THANK YOU, MR. CHAIRMAN.

THE THOMAS F. RYAN LECTURE*

The Legislative Veto After *Chadha*

STEPHEN BREYER**

The Supreme Court, in *INS v. Chadha*,[1] held the legislative veto unconstitutional. Early reports have described the opinion as changing the balance of power between Congress and the executive.[2] Certainly, the decision is important; Congress or the courts will have to reexamine dozens of statutes to determine whether an offending veto clause is severable or whether the entire statute falls with the clause.[3] The balance of power consequences are more difficult to predict.

Tonight, I shall begin a discussion of that subject by asking whether the old veto might reemerge in new legal clothes. Drawing on my experience on the Senate staff, I shall suggest it is just possible that there may be life after death for the legislative veto; but whether Congress will take the necessary steps is uncertain. One might also ask, "Is such a resurrection desirable?" Here, based upon my study of government regulation, I shall express skepticism.

I

Let me clear the undergrowth with three preliminary questions: What is the legislative veto; where did it come from; what does it do.

What it is, essentially, is a clause in a statute, which says that a particular executive action (and by "executive" I mean to include the independent agencies) will take effect only if Congress does not nullify it by resolution within a specified period of time. Variations of detail are possible; the resolution might have to be passed by one House of Congress, both Houses, or simply by a committee.[4] The action itself might take effect while Congress debates, or it might rest in limbo. Whatever the details, three elements are essential:

---

* Delivered October 13, 1983, at the Georgetown University Law Center. The Thomas F. Ryan Lecture was established at the Georgetown University Law Center by Hugh A. Grant in memory of Thomas F. Ryan, a Georgetown University alumnus.

** Circuit Judge, United States Court of Appeals for the First Circuit.

[1] 103 S. Ct. 2764 (1983).

[2] N.Y. Times, June 24, 1983, at 1, col. 4; Wash. Post, June 24, 1983, at 1, col. 1; *see Chadha*, 103 S. Ct. at 2792-93 (White, J., dissenting); *id.* at 2788 (Powell, J., concurring).

[3] *See Chadha*, 103 S. Ct. at 2811-16 (appendix to opinion of White, J., dissenting) (listing examples of current statutes containing legislative veto provisions).

[4] There are also various, more exotic arrangements. Many statutes condition executive actions not on the absence of a legislative veto, but on affirmative endorsement by a congressional resolution. *See, e.g.*, Trade Expansion Act of 1962, 19 U.S.C. § 1981(a)(2)(B) (1976); Energy Conservation and Production Act, 42 U.S.C. § 6834(c) (1976) (specific section repealed by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1041(b), 95 Stat. 357, 621 (codified at 42 U.S.C. § 6834 (1976 & Supp. V 1981))). Several statutes employ what has been labelled the "one and one-half House veto," which gives one House the power to veto an executive action unless the other House affirmatively supports the executive. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9655(a)-(d) (1976 & Supp. V 1981); Omnibus Budget Reconciliation Act of 1981, 15 U.S.C. § 1276(a)-(d) (1982).

1. A statutory delegation of power to the executive;
2. An exercise of that power by the executive;
3. A power reserved by the Congress to nullify that exercise of authority.

Thus, Congress might delegate to the President the authority to commit armed forces to action overseas;[5] it might delegate to the Attorney General the authority to suspend the deportation of those not legally entitled to remain in the United States;[6] it might delegate to the Federal Trade Commission the authority to regulate trade practices by rule.[7] In each instance, it might reserve to itself the power to nullify an individual act taken pursuant to the delegated authority.

Where did the legislative veto come from? Apparently, the first time Congress enacted a veto clause was in 1932 when it gave President Hoover the authority to reorganize executive departments subject to a one-House veto.[8] Since 1932, veto clauses have proliferated like water-lilies on a pond (or algae in a swimming pool, depending on one's point of view). One survey found five such statutes enacted between 1932 and 1939, nineteen in the 1940's, thirty-four in the 1950's, forty-nine in the 1960's, and eighty-nine enacted between 1970 and 1975.[9] Justice White, dissenting in *Chadha*, lists fifty-six statutes that now contain veto clauses.[10] He adds that they have appeared in about 200 laws enacted in the past fifty years.[11] Recently, Congress has found particular delight in applying the veto to regulators—to the actions of the Federal Trade Commission,[12] the Federal Energy Regulatory Commission,[13] and the Consumer Product Safety Commission.[14] Judging from recent legislative proposals to apply the veto across the board to all regulatory activity,[15] *Chadha* may have cut the veto down well before its prime.

What does the veto do? The short answer is "many different things," for its practical effect differs depending upon whether one looks at Defense Department expenditures on airplanes[16] or FTC regulation of undertakers.[17] At a general level, one might describe the veto's function as a legislative compromise of a fight for delegated power. Such compromises are of various sorts.

---

[5] *See* War Powers Resolution, 50 U.S.C. § 1541 (1976 & Supp. V 1981).

[6] *See* Immigration and Nationality Act, 8 U.S.C. § 1254 (1982).

[7] *See* Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 57(a) (1976)) (amended to include legislative veto by Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21, 94 Stat. 374, 393 (codified at 15 U.S.C. § 57a-1 (1982))).

[8] Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414; *see Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).

[9] Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977).

[10] *Chadha*, 103 S. Ct. at 2811-16 (appendix to opinion of White, J., dissenting). It should be noted that a number of Justice White's examples involve requirements of affirmative congressional endorsement of executive actions rather than standard veto provisions.

[11] *Id.* at 2793.

[12] *See supra* note 7. This particular legislative veto was held unconstituional in Consumers Union of United States, Inc. v. FTC, 691 F.2d 575, 577 (D.C. Cir. 1982) (per curiam) (en banc), *aff'd mem.*, 103 S. Ct. 3556 (1983).

[13] Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 202(c)(1)-(2), 92 Stat. 3350, 3372 (codified at 15 U.S.C. § 3342(c)(1)-(2) (1982)). This legislative veto provision was held unconstitutional in Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 478-79 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983).

[14] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1207, 95 Stat. 357, 718-19 (codified at 15 U.S.C. §§ 1204, 1276, 2083 (1982)). The Consumer Product Safety Commission veto provisions are instances of the one and one-half House veto. *See supra* note 4.

[15] *See* S. 1080, §§ 801-803, 97th Cong., 2d Sess., 128 CONG. REC. S2719-21 (daily ed. Mar. 24. 1982).

The veto sometimes offers a compromise of important substantive conflicts embedded deeply in the Constitution. How are we to reconcile the Constitution's grant to Congress of the power to declare war[18] with its grant to the President of authority over the Armed Forces as their Commander in Chief?[19] The War Powers Act approaches the problem, in part, by declaring that the President cannot maintain an armed conflict for longer than ninety days if both Houses of Congress enact a resolution of disapproval.[20] Similar vetoes are embedded in laws authorizing the President to exercise various economic powers during times of "national emergency."[21] To take another example, how are we to reconcile article I's grant to Congress of the power to appropriate money[22] with article II's grant to the President of the power to supervise its expenditure?[23] Must the President spend all that Congress appropriates? Congress has addressed this conflict, authorizing the President to defer certain expenditures subject to a legislative veto.[24]

The veto has also been used to compromise a quite different type of conflict: that which arises within Congress itself because of ever scarcer legislative time. To what extent should Congress, rather than that the executive, spend time on certain highly individual matters that historically called for private bills? Consider *Chadha* itself. Traditionally, an illegal alien, seeking to escape deportation on grounds of special hardship, had to ask Congress for relief. Congress, lacking the time to process the many requests, eventually decided to change the matter to one of administrative discretion, instead of legislative grace. Yet, in granting the executive the authority to grant hardship exceptions, Congress retained one element of grace: the right to veto a deportation suspension it believed unwarranted.[25] Similar time pressure can give rise to tension with respect to private claims for money. Without *Chadha* we might have seen increased delegation to the executive, perhaps with veto attached, as a substitute for some categories of private requests for legislative compensation.

The *regulatory* veto's focus, however, is upon a still different need for compromise, a need arising out of the classic conflict in the administrative state between political accountability and the necessary complexity of regulatory decisionmaking. This complexity forces broad statutory delegations of power. Of course, in principle under article I of the Constitution, "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."[26] Indeed, the Supreme Court in *Schechter Poultry Corp. v. United States*[27] held the National Industrial Recovery Act unconstitutional as an example of "delegation running riot."[28] In practice, however, since *Schechter* Congress has delegated agencies vast powers under statutes written in the broadest possible language. The FTC can stop business practices that are "unfair";[29] the ICC sets "reasonable" rates;[30] the FCC simply acts to serve "public convenience, interest, or necessity."[31]

---

[16] *See* Department of Defense Appropriation Authorization Act, 50 U.S.C. § 1431 (1976 & Supp. V 1981).

[17] *See supra* note 7. The funeral industry regulations are codified at 16 C.F.R. § 453 (1983). Although the regulations were hotly contested and a veto resolution was introduced in the House, no veto was voted and the rules are to go into effect at the beginning of 1984. *See* 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1118, at 1123 (June 9, 1983).

[18] U.S. CONST. art. I, § 8, cl. 11.

[19] *Id.* art. II, § 2, cl. 1.

[20] War Powers Resolution, 50 U.S.C. § 1544(b) (1976).

[21] *See* International Emergency Economic Powers Act, 50 U.S.C. § 1706(b) (1976 & Supp. V 1981).

[22] U.S. CONST. art. I, § 8, cl. 1.

[23] *Id.* art. II, § 3.

[24] Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. § 1403(a)-(c) (1976).

[25] Immigration and Nationality Act, Pub. L. No. 82-414, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c) (1982)). For a brief history of congressional handling of the responsibility for deportation decisions, see *Chadha*, 103 S. Ct. at 2803-04 (White, J., dissenting).

This breadth of language reflects the underlying complexity of regulatory problems. Congress cannot set individual rates, award television licenses, or identify all undesirable business practices. Examination of the arguments made before commissions about how these tasks should be carried out reveals the inordinate difficulty of writing more specific legislation. Indeed, the practical, as well as the political, difficulties of doing so are sufficiently obvious that few if any federal cases since *Schechter* have applied the nondelegation doctrine (though one finds the occasional judicial murmuring about its reappearance).[32]

In a word, Congress delegated broadly to the agencies because it had to do so. The federal judiciary, recognizing the need, ratified the means. At the same time that necessity compelled Congress to delegate, however, concern for congressional authority demanded continuing checks on the agencies. The veto offered the most direct and effective guarantee that delegation would not drain power from Congress.

Once we recognize that the legislative veto acts in different ways to compromise different sorts of interests, we can see the difficulty of assessing the impact of its abolition on the relative power of the President and Congress. The power shift that results from a veto clause depends upon what Congress would have done had the veto device not been available as a compromise.

Many choices are available in the absence of a veto power. At one extreme, Congress might simply have delegated unqualified power to the executive. Of course, even then Congress could still later enact a special law setting aside an executive action with which it disagreed; but it is obviously easier to obtain a resolution of veto from one House of Congress than to obtain a new law from both Houses and the President. Thus, if one believes that Congress, if forbidden the veto, would delegate authority anyway,[33] then one would believe that the veto makes Congress more powerful, and its absence will shift power to the executive.

---

[26] United States v. Chicago, M. St. P. & Pac. R.R., 282 U.S. 311, 324 (1931).

[27] 295 U.S. 495 (1935).

[28] *Id.* at 553 (Cardozo, J., concurring).

[29] 15 U.S.C. § 45(a)(1)-(2) (1982); *see* FTC v. Gratz, 253 U.S. 421, 427 (1920) (construing phrase "unfair method of competition"); Sears, Roebuck & Co. v. FTC, 258 F. 307, 312 (7th Cir. 1919) (same).

[30] 49 U.S.C. § 15a(2) (1976 & Supp. V 1981); *see* Atchison, T., & S.F. Ry. Co. v. United States, 284 U.S. 248, 262 (1932) (discussing nature of ICC's duty to set "reasonable rates").

[31] 47 U.S.C. § 303 (1976); *see* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953) ("public interest, convenience, or necessity" criterion gives FCC wide but not unbounded discretion); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) ("public convenience, interest or necessity" criterion does not confer unlimited power).

[32] *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion); *id.* at 664 (Powell, J., concurring); *id.* at 671-88 (Rehnquist, J., concurring in judgment); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974); Fort Worth & D. Ry. Co. v. Lewis, 693 F.2d 432, 435 n.8 (5th Cir. 1982).

At the other extreme, Congress might have declined to delegate in these areas at all if it could not retain the security of the veto, or, more plausibly, Congress might have delegated to the executive only the power to recommend substantive changes to Congress. Narrowly drawn, a law along such lines would consist of a sentence added to a statute where there now appears a legislative veto, stating that the agency's exercise of the authority to which the veto is attached is ineffective unless Congress enacts a confirmatory law within, say, sixty days.[34] This alternative would significantly shift the balance toward the legislature, because agency decisions would be ineffective without the attention and approval of committees of Congress, both Houses, and the President.

Neither of these alternatives seems realistic in many of the contexts in which legislative vetoes appear. The former would often grant too much discretion to the executive to be palatable to Congress. The other would often hamstring governmental decisionmaking. To state that the executive could never commit troops,[35] or suspend alien deportations,[36] or prohibit unfair business practices,[37] or adjust the rules governing railroad passenger service[38] without a confirmatory law might handicap too severely the executive's, and the nation's, ability to perform needed tasks. As a practical matter, Congress and the President would likely have to forge some other compromise, perhaps a delegation of a more circumscribed but unconstrained power, or perhaps a reliance on the other means of congressional oversight of the exercise of delegated powers.

To the extent that the viable alternatives to the veto are uncertain, so is the veto's effect on the balance of governmental power. This uncertainty likely accounts for the historical fact that presidential attitudes toward the veto have been ambivalent. Every modern President has criticized the legislative veto in principle and questioned its constitutionality,[39] but the same Presidents have often signed into law bills containing vetoes, defended their constitutionality, and even proposed them.[40]

In sum, the legislative veto is new. Its popularity has grown by leaps and bounds. It can serve several very different objectives by responding to several very different sorts of need for compromise. The effect of its abolition upon the legislative/executive power balance must be described with the words, "it depends."

---

[33] *See* S. 1714, 98th Cong., 1st Sess. (1983), *reprinted in* 45 ANTITRUST & TRADE REG. REP. (BNA) No. 1133, at 486-92 (Sept. 20, 1983) (reauthorizing FTC rulemaking without a legislative veto).

[34] *See* 129 CONG. REC. H4773 (daily ed. June 29, 1983) (text of Congressman Levitas' amendment to Consumer Product Safety Commission reauthorization bill).

[35] *See supra* note 5.

[36] *See supra* note 6.

[37] *See supra* notes 7 & 29.

[38] *See* 45 U.S.C. § 564(c)(3) (1976 & Supp. V 1981).

[39] *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1002-29 (1975).

[40] *See Chadha*, 103 S. Ct. at 2793 & nn. 4-5 (White, J., dissenting).

II

Now let us turn to the Supreme Court's decision in *Chadha*. The most important feature of that decision, in my view, is that its holding that the veto is unconstitutional does *not* turn upon any fact concerning the veto's origin, its purposes, or its balance of power effects. Rather, the decision appears formal; it is based upon the language of the Constitution, upon its structural dictates, not upon the function of the veto.

The Court's logic might be explained roughly as follows. From a logical point of view, the exercise of a legislative veto must constitute an exercise of legislative, of executive, or of judicial power—the powers that the Constitution specifically grants to the federal government. If the power is executive or judicial, Congress cannot exercise it, for with a few specifically mentioned exceptions (none of which is relevant here)[41] the Constitution grants Congress only legislative power. If, however, the power is legislative, it must be exercised in the constitutionally prescribed manner. Article I, section 1 vests "all legislative Powers . . . in a Congress . . . which shall consist of a Senate and House of Representatives," both of which must concur in the enactment of legislation. Further, article I, section 7, clause 3, the presentment clause, specifically requires that "[e]very Order, Resolution, or Vote to which the Concurrence of [the two Houses] may be necessary" must be "presented to the President" for his signature or veto. How then can a legislative act such as the legislative veto be valid under the Constitution without both bicameral action and the opportunity for Presidential participation?

The delegation of specified powers from the states and the people to particular branches of the federal government and the system of specified procedural checks on enactment of legislation are, of course, at the very heart of the Constitution's scheme. The *Chadha* majority's simple reliance on the logic and letter of the Constitution and its disclaimer of any concern for the possible wisdom or utility of the legislative veto[42] reflects recognition of this fact. Still, one might wonder at the formality of the decision. Is the logic of the Constitution here so compelling that one can ignore the purposes, the effects, the practical virtues of the legislative veto? In constitutional matters this would be unusual, but the majority believed it had before it that unusual case.

Justice White, in dissent, urged that attention to the functional importance of the veto demanded a more circumspect approach that would allow a more flexible interpretation of the Constitution's language.[43] Yet a reading of his dissenting opinion is instructive in part because it demonstrates how difficult it is to read the language more flexibly in this particular case. The pure constitutional logic to which the majority pointed is very difficult to overcome. Essentially, the dissent agreed that to legitimate the veto the Court would have to stretch the Constitution's language, but Justice White argued that its language has been stretched equally far in other analogous instances. The analogies he offered, however, did not persuade the Court.

---

[41] The exceptions include U.S. CONST. art. I, § 2, cl. 5 (House's power to impeach); *id.* art. I, § 3, cl. 6 (Senate to try impeachments); *id.* art. II, § 2, cl. 2 (Senate power to approve Presidential appointments and to ratify treaties); *id.* art. I, § 5, cl. 2 (control over internal congressional rules).

[42] *Chadha*, 103 S. Ct. at 2784-88.

[43] *Id.* at 2796-98 (White, J., dissenting).

First, if Congress can delegate a form of legislative power to the executive,[44] Justice White asked, why can it not delegate a form of legislative power to some of its own members?[45] This question, however, does not answer itself. The type of legislative power that Congress has delegated to the executive is the power to make rules, and rulemaking is often an integral part of administering just as it is an integral part of judging. Thus, one does not depart far from the Constitution's letter in stating that the Constitution, in granting administrative powers to judges allows them, at least in some instances, to make rules. So, this example does not readily justify the greater departure from the Constitution's letter that would be necessary to allow a part of Congress to legislate on its own.

Similarly, the dissent points to cases that have upheld congressional delegation of legislative-like powers to private groups.[46] The legislative veto, however, involves a delegation to those who will act in their official capacities as members of Congress; in that capacity they can possess only those powers bestowed upon them by article I. The question of how, say, one House could exercise legislative power in the face of express bicameral and presentation requirements then seems to arise in a context different enough to make the private group analogy less compelling.

Finally, the dissent noted that the one-House veto carries out the Constitution's spirit, for it means that executive action would take effect only if the Executive and both Houses of Congress approved it.[47] The executive action might be viewed as an executive proposal to the Congress, later enacted by the silence of both Houses. Yet, to analogize silence to legislating goes rather far. If one takes the analogy literally (if, for example, one would still require the President to act pursuant only to constitutionally, and thus congressionally, delegated authority) one destroys the analogy's power. If the President can act only along express constitutional paths, how can Congress act differently? Why is it any more reasonable to view silence as the legislative approval of an executive act taken pursuant to statutorily delegated authority than to view it as a grant of appropriate legislative authority? In both cases, silence seems quite far removed from the Constitution's paths of bicameralism and presentation to the President.

This brief discussion points to weaknesses in the force of the dissent's analogies. Perhaps stronger analogies are available. Professor Freund has suggested looking at the basic veto-conditioned delegation as an effort to make certain that future Congresses and Presidents continue to agree to the delegation, and the nonexercise of the veto as evidence of the continued agreement. Regardless, the main difference between the majority and the dissent in my view is a difference that centers on the role of the Constitution's language here. The majority believed that approval of the veto would require too much flexibility in reading the words, too drastic a departure from the Constitution's form. It would leave us at sea as to what the Constitution does or does not require when separation of powers is at issue. The dissent's analogies failed to convince the majority (again, when separation of powers is at issue) that the Court has ever previously departed so significantly from the Constitution's text and logic.

---

[44] *See* text accompanying *supra* notes 26-33.

[45] *Chadha*, 103 S. Ct. at 2801-03 (White, J., dissenting).

[46] *See id.* at 2802-03 (discussing Currin v. Wallace, 306 U.S. 1, 16-17 (1939), and United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577-78 (1939)).

[47] *Chadha*, 103 S. Ct. at 2807-08 (White, J., dissenting). As Justice White observes, this justification is applicable only to one-House veto provisions. When a two-House veto is required to block executive action, one House's unwillingness to go along with a proposal will not render it null if the other House sides with the executive and refuses to join the first House in enacting a veto resolution. Justice White concluded that "the one-House veto is of more certain constitutionality than the two-House version." *Id.*

If I am right, the majority may have believed it had before it a *Schechter*-type example—an extreme case. *Chadha* may then follow *Schechter* as a judicial tree that bears little fruit. To define an extreme tells us little about what happens in the more ordinary case.

III

Chadha's avoidance of consideration of the veto's functions or objectives leaves open the question of the extent to which Congress can still accomplish those functions and pursue those objectives after *Chadha*. Congress unquestionably retains a host of traditional weapons in its legislative and political arsenal that can accomplish some of the veto's objectives. These include the power to provide that legislation delegating authority to the executive expires every so often. To continue to exercise that authority, the executive would have to seek congressional approval, at which point past agency behavior that Congress disliked would become the subject of serious debate. Moreover, Congress might sometimes tailor its statutes more specifically, limiting executive power.[48] Further, Congress can require the President, before taking action, to consult with congressional representatives whose views would carry significant political weight. Additionally, Congress can delay implementation of an executive action (as it does when the Supreme Court promulgates rules of civil procedure)[49] until Congress has had time to consider it and to enact legislation preventing the action from taking effect. Finally, each year Congress considers the agency's budget. If a significant group of legislators strongly opposes a particular agency decision, it might well succeed in including a sentence in the appropriations bill denying the agency funds to enforce that decision.[50]

All of these traditional alternatives, however, have obvious drawbacks or features that make them function quite differently from the legislative veto itself, and their balance of power effects are different. Building in an expiration of executive authority risks agency program disruption; trying carefully to tailor legislation presents the practical difficulties of greater linguistic specificity; requiring consultation does not compel obedience; delaying implementation would condition congressional control upon the eventual enactment of a law; and budget control is often random, given time pressure to enact appropriations bills. Still, these alternatives, imperfect as they are, count for something.

---

[48] *See* S. 1714, §§ 6, 9, 98th Cong., 1st Sess. (1983), *reprinted in* 45 ANTITRUST & TRADE REG. REP. (BNA) No. 1133, at 486, 488, 489 (Sept. 29, 1983) (narrowing authority of FTC to engage in rulemaking in wake of *Chadha*).

[49] *See* 28 U.S.C. § 2072 (1976).

[50] *See* Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(c)(1) (1982) (refusing the FTC funds for issuing rules concerning funeral industry unless rules conform to congressionally prescribed contours).

Moreover, if my basic view of the *Chadha* opinion is correct, it should be possible to come closer—to develop a veto substitute that satisfies the literal wording of the Constitution's bicameral and presentation clauses while it more nearly approximates the compromise functions of the legislative veto. I shall describe as a veto substitute the closest I have been able to come to doing so.

My veto substitute is a variant on the suggestion that Congress could replace veto provisions in present statutes with provisions that conditioned the legal effect of exercises of delegated authority on subsequent enactment of a confirmatory statute. We noted before that the confirmatory law strategy would drastically and unworkably undermine executive or agency power because it is so much harder to enact a new law than to decline to exercise a veto.[51] Thus, the confirmatory law approach is too big a gun to be of practical value.

Whether a confirmatory law is easy or difficult to enact, however, is largely a function of internal congressional procedural rules, a matter that is within the exclusive control of Congress. If those rules could be changed to make confirmatory law procedures rather like legislative veto procedures, the practical effect of the two could be made quite similar; the confirmatory law gun could be reduced to a size about equal to the legislative veto gun. Then Congress could reasonably have no more qualms about attaching the one to a delegated power than the other, and the shift of power from legislative to executive branch need not take place.

To be more specific, if the legislative procedural rules can be changed to make the enactment of a confirmatory law no more difficult than stopping the enactment of a veto resolution, then there will be no shift of power away from the executive branch. If those rules could make stopping the passage of such a law precisely as easy as the passage of a resolution of veto, then there would be no shift of power toward the executive branch. In fact, there would be no change at all in the balance of power. Because the burden of inertia is a function of internal legislative procedure, not of the Constitution, this might be done.

Take the Senate as an example. Assume that all legislative veto provisions in statutes were replaced with special confirmatory law requirements. Then suppose that the Senate rules provided a special fast track for special confirmatory laws. That fast track rule would provide: 1) when an executive branch agency enacts a regulation (or takes other action) subject to a special confirmatory law requirement, a bill embodying that special confirmatory law shall be introduced automatically (say, under the name of the Majority Leader, as sponsoring Senator); 2) the bill will be held at the desk, and not referred to committee; 3) the bill will be neither debatable nor amendable; it cannot be tabled or subjected to filibuster, etc.; and 4) the Senate will vote upon the bill, up or down, within sixty days of its introduction. The House would have a similar fast track. If the fast track is followed, the bill automatically becomes law (unless, of course, one House opposes it).

---

[51] *See supra* notes 34-38 and accompanying text (discussing use of confirmatory laws).

The rule could even go on to say that the bill can be derailed, that is, removed from the fast track, but only by a majority vote of the Senate. Because derailing means referral to committee, etc., it likely means defeat. In other words, the confirmatory law could be stopped, and thus the executive action at issue could be stopped, if and only if a majority of the Senate or the House votes to derail it. That *is* the one-House veto. To replicate a committee veto the rule would simply allow derailment by a majority vote of the relevant committee. If there is a need to have the executive branch action take effect immediately instead of after sixty days, the basic authorizing law would simply allow the action (say, committing troops) for sixty days, but no longer, without a confirming law.

In its main features then, the substitute fast track approach closely resembles the legislative veto. The agency is given effective authority to take an action of a specified type unless Congress disagrees. All of the compromises achieved by the veto can be largely preserved. Congress is able to delegate broad powers but retains the opportunity to review any exercises of those powers that it finds particularly objectionable, without imposing on itself the burden of reviewing each particular exercise. The method by which this is done, however, is different from that followed by the traditional legislative veto; the Constitution's language is followed as a matter of form. Thus, whatever legal questions might arise, they should not be the same as those at issue in *Chadha*.

The substitute does not replicate the veto perfectly, and the difference should be noted. First, the veto substitute imposes on Congress a degree of visible responsibility for the actions it confirms, a burden that the veto system allowed it to avoid. Under the legislative veto, the vast bulk of decisions subject to review would elicit absolutely no congressional action or consideration. Even when congressional action was initiated, a resolution of veto might be introduced into a committee only to disappear, thereby freeing the Senators from having to take a public vote on the matter. With the proposed veto substitute, however, a small group of senators could force a roll-call vote on even the most run of the mill (nondebatable, nonamendable) confirmatory law because the Constitution requires that one-fifth of the senators present retain the power to require a roll-call on any matter.[52] Even in cases where no vote was recorded, the fact that the legislators had to admit that Congress *acted*, rather than passively failed to act, might make a difference to constituents. That in turn might make a difference to the legislator. Moreover, a future Congress or either House, hostile to the agency, might simply repeal the special procedural rules. All this might make the balance of power consequences somewhat different from those of the legislative veto.[53]

---

[52] U.S. CONST. art. I, § 5, cl. 3.

[53] Another limitation of the veto substitute is its inability to replicate the one and one-half House veto. *See supra* note 4 (discussing one and one-half House veto). The one and one-half House veto permitted one House to override, by affirmative vote, the veto of agency action adopted by the other House. Under any arrangement, no matter how streamlined, that conditions agency actions on a confirmatory law, opposition to a particular agency decision by a majority of either House will be fatal, regardless of the other House's overwelming approval of the agency's choice.

Second, the veto substitute could affect judicial review of administrative exercises of delegated authority. The chief task of judicial review at present is to determine whether the administrative action abides by the terms of the statutory delegation that authorizes it. If, however, the agency action were promptly embodied in a new statute, there would be no opportunity for this issue to be raised because the new statute would stand independent of the original delegating statute. One can minimize this problem by making the proposal more complex. Judicial review could be preserved if the congressional rules required that each special confirmatory law include a clause rendering it ineffective unless the administrative action that initiated it would have been a valid exercise of the delegated authority, absent the requirement of a confirmatory statute. Alternative forms of language are possible, but all are complicated and Congress might be reluctant to provide them.

Third, the confirmatory law approach, unlike the legislative veto, would require the President's signature to confirm each administrative action. Where the original delegation was to the executive branch, the President might routinely be expected to back the executive agency so that the added requirement would not make much difference. Where independent agencies are involved, however, the substitute approach would, in effect, introduce an executive veto everywhere it provided for legislative review. Congress would have to choose whether to subject agency action to checks by both branches or by neither.

Fourth, it is difficult to replicate the two-House veto. One could try by having the Senate rules, for example, condition derailment on the House also voting to derail from the fast track. The fast track, however, must eventually lead to a vote, and if one House votes "no," the confirmatory law is stopped and the agency action fails.

Fifth, there is an important question of practical politics: Would Congress wish to amend its rules even if it knew that it could replicate the veto by doing so?[54] For one thing, the overall political effects of doing so are uncertain. For another, some fine tuning, hence several consecutive amendments, would likely be needed. Finally, to open the subject of rules change is itself treacherous. Many different legislators with wide-ranging and conflicting notions of rules reform would be likely to seize the occasion to present their own ideas. Present House and Senate rules have the virtue of an uneasy compromise that has stood the test of time. Opening the subject and adopting changes that are potentially far-reaching and of uncertain outcome cannot be undertaken lightly.

In sum, the veto substitute is not a precise functional replica of the veto, but it comes close. Still, the question for Congress is whether it so strongly desires the legislative veto that it will pay the price of radical and complex change of its internal rules of procedure (a change that could bring with it a more thorough consideration of rules reform), or whether Congress will rest content with a status quo that includes the less effective substitutes for the veto that I have mentioned.[55] To answer the question, Congress will have to reconsider a matter that the *Chadha* Court expressly put to one side, namely the veto's wisdom or desirability. In a word, is it necessary?

---

[54] Congress' attitude on this question may be tested by an amendment offered by Senator Kasten to the Senate's proposed FTC reauthorization bill. *See* 129 CONG. REC. S13,110-11 (daily ed. Sept. 28, 1983) (text of Kasten amendment). Senator Kasten would delay the effective date of any FTC rule to allow Congress an opportunity to enact an overriding law and would place any proposed "resolutions of disapproval" on a special fast-track in both Houses.

IV

I cannot answer the question of the veto's necessity as a general matter. Because the veto serves many different purposes, one can only conclude whether the veto is good or bad after studying the particular substantive areas where its use is proposed. Of course, at a highly abstract level of argument, one can imagine a general point in its favor. The veto allows Congress to mitigate the risks of delegating vast, unchecked power to the executive. It assures Congress that when the executive makes a decision that has political impact it can review that decision. Thus, ultimate case-by-case authority rests in a politically responsible body, one elected by the people, rather than a bureaucracy.

Even this argument, however, does not ring true as applied, for example, to presidential war powers. As soon as one is at all specific, it becomes apparent that questions concerning national defense or the President's spending powers are quite different from those surrounding the regulatory powers of the Federal Trade Commission, the Consumer Product Safety Commission, or the Federal Energy Administration. My view of the veto's wisdom is not necessarily the same in all of these areas. I can, however, discuss the practical arguments for and against the veto in the regulatory area, an area with which I am familiar, and doing so might suggest the type of pragmatic judgment called for in evaluating the veto in other contexts.

The major argument favoring the regulatory veto, and one accounting for its popularity, is a simple one: Regulatory agencies are out of control and the veto offers the electorate a rein to halt or to guide them. This argument draws added force from our growing disenchantment with alternative methods of checking agency power.[56] At the time of the New Deal, some believed that the agencies might develop a science of regulation, the canons of which would hold agency managers in check through their sense of professional discipline. Today, few believe, for example, in a science of ratemaking. In the 1940's and the 1950's it seemed that fair and open procedures, as embodied in the Administrative Procedure Act,[57] would keep agency power in check, but today we suspect that at best procedures guarantee a fair result; and we are aware that a fair ratesetting or power plant siting process does not necessarily mean an economically sensible rate or an environmentally optimal plant location.

It is not surprising that those who now diagnose the regulatory problem as one of unchecked bureaucratic power look for another responsible body to provide a check. Under our Constitution, when we search for checks and controls we are inevitably drawn toward one of the three major branches.[58]

---

[55] *See supra* notes 33-40 and accompanying text (discussing possible veto substitutes).

[56] *See* S. BREYER, REGULATION AND ITS REFORM 341-68 (1982) (discussing virtues and weaknesses of alternative methods of controlling agencies).

[57] Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C. & 7 U.S.C.).

[58] *See* S. BREYER, *supra* note 56, at 357-61 (discussing possible supervisory roles of three branches at greater length).

One might reasonably find flaws in proposals that would give the President more power to control agencies. Does the President have the time or the inclination to involve himself in the details of regulation? Can the Executive Office staff adequately second guess the agencies, or, in order to understand the subject matter and hence the merits of a proposed regulation, will it have to grow in size, replicating the very bureaucracy it seeks to replace? The subject requires more discussion, but it is safe to say that increased Presidential power to control the agencies is no panacea for the problems of regulators.

The judges cannot control the agencies very effectively. Statutory standards that are broad enough to allow them to escape congressional control similarly inhibit review of agency action by judges. The judges' legal ability to require more procedure, the efficacy of their doing so, their ability to second guess agencies on matters of substance, are all open to most serious question.

Under these circumstances, a broad congressional delegation of power to the agency coupled with a veto that allows Congress subsequently to review actions that turn out to have political importance appears to be a plausible compromise with the needs of the administrative state. If the regulatory agencies are out of control, the veto provides a practical check on the power of the agencies to act in a politically unpopular way, a power that, without a veto, practical necessity might require Congress to concede them through a broad statutory delegation.

Despite the appeal of this argument, there are powerful if not overwhelming practical considerations on the other side.[59] Some of its opponents argue that the veto gives those who are subject to regulation a chance to escape it; those likely to succeed are those with sufficient political influence to capture the attention of Capitol Hill. The critics add that the possibility of a veto would make it difficult for agencies to plan. How could a Maritime Commission Chairman, for example, introduce procompetitive reform of ocean shipping regulation, knowing that Congress might veto one essential element of the plan but approve another? Furthermore, what would happen to the procedural regularity that, from the point of view of fairness, is one of the virtues of agency practice? Given the large number of agency rules, would a legislative veto or veto substitute not tend to become a congressional *staff* veto? In self-defense, would agencies not have to seek the advice of congressional staff before promulgating a rule? If so, would interested parties not seek to convert that staff before approaching the agency? Because Congress has no set procedures for such negotiations, the parties would thereby circumvent agency procedures designed to allow them to see and comment upon one another's claims. Finally, will the veto increase the congressman's fear of special interest groups, each of which is likely to hold the member responsible for numerous agency decisions over which, in reality, he has little control?

The argument against the veto that I find strongest, however, is one that asks, is the diagnosis of the regulatory disease that it presupposes the correct one? Is it that agencies are, or were, simply out of control and that the veto acted as a salutory check on bureaucratic overreaching? I think it fair to say that such was not true of airline or trucking regulation, two instances where overregulation severely harmed the public and where procompetitive reform has brought shippers, travelers and consumers significant benefits in the form of lower prices.[60] The agencies prior to reform may not have been doing well, but they were not overreaching. They were simply following the statutes that Congress had previously enacted, carrying out regulatory practices developed over half a century and doing so, at worst, in an overly literal manner. Reform in those areas consisted of a total rethinking of the regulatory program followed by a total rewriting of the basic statutes in order to introduce price competition into the industries.[61] There is no reason whatsoever to believe that the legislative veto of agency rules, had it existed, could have contributed significantly to the reform process.

---

[59] *See id.* at 357; *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings Before the Senate Government Operations Comm.*, 94th Cong., 2d Sess. 166-72 (1976) (statements of Alan B. Morrison and Reuben B. Robertson).

Vetoes have typically been used only in interstitial ways. Consider the two regulatory vetoes that so far have atttracted the most attention: the congressional decisions to veto the Federal Trade Commission rule concerning used car dealers[62] and the Federal Energy Regulatory Commission rules governing the distribution of price increases resulting from the deregulation of natural gas.[63] Arguments can be made for, and against, each of the vetoed rules, but it is difficult to see how, from any point of view, they can be viewed as exemplifying the worst agency abuses or how the vetoes of them constitute major regulatory reform.

I shall stop the discussion of the regulatory veto's wisdom here, for I have said enough to show that the arguments and considerations are very different from those at issue in the context of, say, presidential war powers or even deportation suspensions. I have expressed a strong note of skepticism as to the need for the veto in the regulatory area.

V

One result of *Chadha* is that either Congress or the courts will have to reexamine the many statutes in which legislative vetoes appear and redetermine their wisdom. A reexamination is necessary because undoubtedly parties affected by each of the many statutes will argue that, without the veto, Congress would intend the whole delegation of authority to fail, so the agency lacks authority to act. Others will argue that without the veto Congress would still wish to delegate authority, so the agency retains the authority to act. If Congress does not answer these questions, the courts apparently will have to draw on past legislative history in an effort to do so.

---

[60] For a good general history of airline reguiation and deregulation, see E. BAILEY, D. GRAHAM & D. KAPLAN, DEREGULATING THE AIRLINES—AN ECONOMIC ANALYSIS 6-53 (report of Civil Aeronautics Board, May 1983); *Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) (presenting backround for deregulation).

[61] *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.); Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1464 (1978) (codified in scattered sections of 49 U.S.C.).

[62] S. Con. Res. 60, 97th Cong., 2d Sess., adopted by Senate, 128 CONG. REC. S5402 (daily ed. May 18, 1982), and by House of Representatives, 128 CONG. REC. H2882-83 (daily ed. May 26, 1982). The veto was invalidated as unconstitutional in Consumer Union v. FTC, 691 F.2d 575, 577-78 (D.C. Cir. 1982) (per curiam) (en banc), *aff'd mem.*, 103 S. Ct. 3556 (1983).

[63] H.R. Res. 655, 96th Cong., 2d Sess., 126 CONG. REC. 11,800 (1980). The veto was invalidated as unconstitutional in Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 478-79 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983).

If my analysis is correct, then Congress, in addressing the many statutes containing veto provisions, has the option of eliminating the veto and falling back on traditional alternatives, such as reliance upon hearings or appropriations bill amendments, or it can make radical changes in its rules and create a veto susbstitute. The latter course is open to it if it believes the veto necessary. The political difficulties of changing the rules will create a practical test of congressional belief in the veto's importance.

One suspects that, in fact, the traditional alternatives will prove adequate in most areas. If the veto totally disappears, however, one need not necessarily blame the Supreme Court. One might conclude that there was not a sufficiently strong demonstration of its practical necessity.

Senator GRASSLEY. I would also like to say that unfortunately Chairman Thurmond is unable to be with us today. However, he has a statement strongly supporting our amendment to include in the record—which I am appreciative of—and look forward to his continuing support as well.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR STROM THURMOND

I would like to thank the distinguished Chairman of the Subcommittee on Administrative Practice and Procedure for his fine efforts in arranging this series of hearings on the issue of the legislative veto. Past hearings before this Subcommittee on this issue have been useful in examining the options available to Congress in the wake of the Supreme Court decisions striking down the use of the veto. While it is still not clear how widespread the ramifications of the *Chadha* and the related decisions will be, Senator Grassley and the members of this Subcommittee have been busy searching for an effective means of restoring the proper working relationship between the various agencies and the legislative branch.

It had become an accepted practice for the Congress to delegate to the various agencies the authority to promulgate rules, regulations, and, consequently, policy. This practice, while not perfect, provided a flexible method of developing the needed regulations without enacting cumbersome and costly legislation every time. The veto was seen as an effective means of controlling the constantly expanding regulatory authority of the agencies and a necessary mechanism to accompany the authority Congress had originally delegated.

When the legislative veto mechanism was removed, Congress was left with the task of finding a feasible, yet flexible, means of restoring control over the agencies. The task was not an easy one; there were both practical and Constitutional constraints.

Senator Grassley has found the answer and had offered it in the form of an amendment to S. 1080, the Regulatory Reform Act. While this Act has passed the Senate by a vote of 94-to-nothing in the past, the amendment offered by Senator Grassley will serve to perfect that void left by the legislative veto decision. I have cosponsored the amendment because if offers the most practical and Constitutionally valid approach possible.

The amendment would require a joint resolution of approval, signed by the President, for all "major" rules and regulations before they could be enacted. The amendment would further require the passage of a joint resolution of disapproval to keep a lesser rule or regulation from becoming effective. The amendment carefully sets out specific procedures for the expeditious passage of the resolutions and specifies what guidelines are to be used in determining what is, and what is not, a "major rule". The mechanism set out in the amendment meets the bicameral and presentment requirements of the Constitution while preserving the flexibility needed to make it legislatively feasible.

Regulatory reform is desperately needed. Burgeoning red tape and bureaucratic waste dictate the need to control the issuance of rules and regulations. Passage of S. 1080, the Regulatory Reform Act, will return law-making to the elected officials. A meaningful alternative to the legislative veto is essential to that goal.

We have a list of distinguished witnesses appearing today to share their views on the legislative veto and the proposed alternatives to it. Among those present are members of both Houses of Congress. I thank all of our witnesses for sharing their insights with the Subcommittee and I look forward to your testimony.

Senator GRASSLEY. I would like to start off by welcoming a person that I have worked closely with on the very subject of legislative veto since I have been in the Senate and he was working on it well before my membership in this body particularly as it related to FTC legislation in 1979 and 1980.

Senator Levin and I have worked together these past 3 years and though we have some differences of opinion on the best way to handle this issue in light of the *Chadha* decision, I look forward to our continuing close working relationship and I would ask you to proceed as you see fit, Senator Levin.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Thank you very much, Mr. Chairman and Senator Heflin.

I am delighted to be with you today and I want to commend you on exercising your leadership in a very, very critical area. I came to this town absolutely determined to do something about an unaccountable bureaucracy As a local official, I had seen that bureaucracy run wild. I had seen it lose its accountability to the elected officials of this country. I was tired, frankly, of being told by unelected bureaucrats that I could not get relief there, that I had to go somewhere else. I was tired of being told by elected officials that I had to go to see some bureacracy for relief, that I could not get relief in the Congress, that it was not their jurisdiction to do anything or that they did not have the power to do anything, that the rules were made by some agency in some other town.

I do not think that is the way elected government should work. I think elected officials should be accountable for major decisions and should not be able to duck behind the bureaucracy or say, "Hey, that is somebody else's problem." Frankly, as a local official in my home town I had a full dose of being told, "Sorry, nobody can do anything about it;" that is the way the regulations read.

I came to this town absolutely determined to do whatever I could to give Congress the power to veto regulations that affect so many people's lives. Elected officials must have that power or else we are going to see an awful exercise of unaccountable power in this democracy.

So, as the chairman mentioned, I proceeded to get deeply involved with Senator Boren and others and later on with Senator Grassley and Senator Schmitt, and many others to try to find the mechanism which was constitutional to give us veto power over regulations so that people who are in business or people who are elected at the local level could come to Congress and get some relief from regulations and not be told, "Sorry, we cannot do anything about it," but, rather would be told, "OK, it now is our responsibility, and we will either act or not act depending on what we think is appropriate."

As the members of this committee know, this Senate has adopted in several votes relative to legislative veto, a so-called joint resolution of disapproval which was originally the Levin-Boren proposal. On FTC we did it by an overwhelming vote of 87-10. The Senate is on record as putting the Congress in a position to veto the regulations of that bureaucracy.

We are not on record, nor do I believe we should be, as changing the relationship of Congress to the administrative agencies so that we substitute ourselves for them, and I am afraid that is what the pending amendment would do. Because rather than telling Congress, here you have authority to veto regulations, this amendment would generically, on the major rules, say that in effect we would be substituting ourselves—we would be putting ourselves in the role of the agency--because we would have the affirmative duty of approving those rules rather than the oversight duty of disapproving the rules.

I think one is the correct approach, which is the disapproval function, the joint resolution subject to Presidential veto, telling the bureaucracy, telling the regulators, "Sorry, this regulation is not what we had in mind. We do not think it is a good regulation; go back and do it over again." That is a legitimate part of congressional oversight. It is an essential part, in my view, of congressional oversight. It is different, very different in kind from generically placing Congress in the position of affirmatively having to approve those major rules.

And so my fear is that as well intended as the amendment is, and I support its purpose, obviously—we have worked very closely in carrying forward mechanisms to oversee the bureaucracies and regulatory agencies—I am afraid that this goes over the line that must be drawn between Congress and the administrative agencies.

Agencies are responsible for executing our laws; we should not be substituting ourselves or putting ourselves in their shoes. We should be exercising the oversight function, telling them yes or no—the regulation either does carry out our intent properly or does not.

But we should not be blurring the distinction that must exist between the legislative function and the administrative function, and it is my fear that by requiring affirmative approval, generically, for major rules that we will in effect be blurring that critical function between the Congress and the regulatory agencies.

Now, there is another problem that I see with this proposal besides the blurring of those two essential functions, and I think you put your finger on it, Mr. Chairman, when you said that it is very close to a one-house veto. It is. And it seems to me that that is a real problem with the amendment because in effect it seeks to accomplish a one-house veto.

It does not permit Congress to change the regulation. It is not truly legislation because the resolution of approval which is set forth in the amendment does not permit Congress to amend.

Congress only must approve or not approve. And once you take away that amendment power you in effect have a one-house veto of disapproval. At least I do not see any other way of looking at it in the absence of an amendment power. So when the chairman said that it is very close to a one-house veto, I think that that is why it is perhaps constitutionally flawed. I think it would be perceived as such by courts as a way of doing indirectly what *Chadha* said we cannot do directly.

So I think there is a constitutional problem with it as well as a policy problem in blurring the essential distinction between the legislative and the administrative functions.

One other point that I want to make and then I am going to rest and I will be happy to answer questions, of course. There is another problem that I see with the amendment. Not only does it radically change the relationship between Congress and the administrative branch, but it also changes the relationship between the executive and the independent regulatory agencies.

Right now the President cannot veto the regulations of the independent agencies. We are all familiar with Executive Order 12291, which allows the OMB to review the proposed regulations of executive branch agencies. But review power cannot and is not given by that Executive order over the regulations of independent agencies. And I do not know of any court that has ruled or would rule that the executive branch can veto regulations of independent agencies.

It is one thing to say that it can veto a HUD regulation. I happen to not have too much of a problem with that, by the way, providing that veto is exercised in a public way and people know who is doing the regulating. I kind of supported OMB oversight over the executive branch agencies under those circumstances.

But nowhere do I know of the President or OMB being given authority over independent agencies' regulations, and this amendment in effect gives the President authority over up to 75 of those regulations because he can, under this amendment, designate up to 75 regulations as major.

If the President picks an independent agency regulation and identifies it as a major regulation, it then subjects that regulation to the approval process, which is set forth in the amendment, which includes a Presidential veto. And that then gives not only us veto power over the independent agencies' regulations, which is perhaps less questionable since they have been created by us, they are almost a creature of the legislative branch. But this very questionably—indeed, I believe improperly—would give the President the authority to veto up to 75 regulations of independent agencies.

And so that is an additional problem which I have with the amendment. Now, I have spent my time on the problems that I have with this amendment. Forgive me. I think the chairman knows how supportive I am of his purpose. And without repeating all the reasons why we ought to have legislative veto, let me just simply say that I am glad that you folks are doing what you are doing. I think it is essential that we find a way to bring some accountability into this process. *Chadha* has left us in a state of limbo. We must find a way to increase accountability of elected officials over these agencies.

I happen to agree fully with the purpose of this amendment, and while I have problems with it and think there is a better alternative to it, I nonetheless want to commend the Chair and the other members of this committee for its search and for your search for correct ways and strong ways of bringing accountability into the process.

And again I am a little bit apologetic because I have spent 9 of my 10 minutes saying what the problems are with this amendment. If we had a lot more time and if I wanted to take more time of this committee, I would have spent my first 10 minutes saying how important it is that we do something. Because you have heard that from me and because you believe it yourself as deeply as I do, I saved that part of the speech and concentrated on the problems that I see with this amendment, leaving, I hope not unsaid, because it is not unfelt, my feelings about the importance of bringing regulatory reform to the floor, having a strong legislative veto mechanism in it, yet one which preserves the difference between the executive branch and the legislative branch, and also one which does not purport to give the President authority over the regulations of the independent agencies.

So, I thank the Chair. That is the end of my statement.

Senator GRASSLEY. Thank you, Senator. I see some basic philosophical differences between my proposal and yours, and I say that in light of the fact that you are aware that I cosponsored S. 1650 when it was introduced immediately following the *Chadha* decision.

At that time my support was qualified by my desire to develop a proposal that would be more effectively controlling of the bureaucracy and yet be constitutional. As time went on and other ideas came to light, I saw some flaws in S. 1650.

We effectively shift the legislative process under S. 1650 from the executive proposing legislation to Congress to a situation where Congress proposes legislation to the President. Congress is removed from making the decisions and must have a two-thirds majority to make its own will known. The President holds the cards and tells the Congress that in order to, as an example, prevent a new used car rule from going into effect; Congress must in turn pass legislation.

In effect, this is a reversal of the legislative process. Instead of making ourselves more accountable in light of the *Chadha* decision, under S. 1650 we are making ourselves less accountable.

Under your proposal the one-house vetos currently in law would be drastically altered, essentially emasculated. And instead of preventing rules by a majority of both Houses as in the two-house veto, we would have to show our will by a two-thirds majority of both Houses. The question becomes then a very basic one and it is what sort of a club should the Congress hold over an agency.

Do we want to use a baseball bat to really get their attention or maybe end up using a feather duster that can be simply brushed away. That is where I see the major differences between where I am and where you are.

However, I would say aside from our philosophical distinctions I see some specific problems with S. 1650 and hence a question or any sort of comments or reactions you want to make to what I have already said. Currently, it contains a prohibition against judicial review of agency compliance. In addition, the bill waives congressional review if the agency head makes a finding of good cause or an emergency.

My question is whether or not this does not essentially gut any effective congressional oversight. Where is the incentive to comply with even this weak form of legislative inspection?

Senator LEVIN. First, Mr. Chairman, on your comments, again I think it is the correct question—what sort of club do we want to hold over the agencies. These are two different clubs. One I do not think could be called a baseball bat and the other one a feather duster. I will not agree with that description of them, but I think they are two different kinds of clubs. One I believe is clearly constitutional, designed to preserve the different roles of the legislative and executive branches of the Government; the other one blurring that role and raising the one-house veto problem that I identified because, as you said in your opening statement, in effect, this amendment does provide a one-house veto.

So I think that there are indeed two different kinds of clubs. I think ours is better honed, will work, and will be held constitutional. As a matter of fact, ours has worked.

Senator GRASSLEY. Could I remind you, though, that I am only talking about rules that have a $100 million impact.

Senator LEVIN. No, I agree with that. I do not think the amount of the dollars relates to the constitutional questions, however.

Our club has worked. I must say that just about all of us, I think, participated in it. And that was the amendment on FTC, the so-called Levin-Boren amendment. It worked on the used-car rule. It was a two-house resolution of disapproval that was finally implemented. And we found it is workable; we have proved that it is workable.

It may require a two-thirds vote of Congress under a joint resolution to disapprove of a rule. But that seems to me to be relatively easily achieved, if history is any guide. In fact the used-car rule was disapproved by a two-thirds vote of both Houses. It is not difficult when Congress disagrees with a rule to get the two-thirds vote.

The difficult part, frankly, is to get to the floor, to stop a filibuster. And that is why we have the expedited procedures in the so-called Levin-Boren approach. It is those expedited procedures which give it teeth and it has proven over time to have teeth.

And may I say, talking about teeth, that the most important part about these approaches, both yours and ours, may I say, is the deterrent effect. We do not expect these vetoes to be exercised frequently, but we do expect them to deter the agencies from doing things which don't make sense.

It does give Congress negotiating power through the deterrent effect, the possibility of the veto being exercised. As has been said, the real impact of these vetoes is bringing up the agency short, telling them unless you negotiate and reach sensible, practical, workable solutions to the problems you face, consistent with congressional intent, Congress has that mechanism which it will use.

We do not expect to use it very often. There are a lot of legislative vetoes in the laws already. They have not been used very often, but it is the fact that they are there which makes it unnecessary to use them very often. So it is the deterrent effect that is the real strength here, as well as, we have seen, the occasional actual use of these vetos.

Senator **Grassley**. Could I ask you to comment on the judicial review point that I made.

Senator **Levin**. I did not understand the question. I am sorry.

Senator **Grassley**. The bill waives congressional review if the agency head makes a finding of good cause or an emergency. And so my question is, does this not essentially gut any effective congressional oversight? In other words, where is the incentive to comply with even the weakened form of congressional legislative inspection?

Senator **Levin**. We did make a provision, and I will have to go back and study that particular detail, but we did make a provision for an emergency where Congress might be out of session, as I remember it, where there might be some reason for a rule going into effect immediately. I think whatever we end up doing, we want to provide for an emergency, whether it is your approach or our approach.

I would think there will be occasions when we do want to authorize the regulatory body to certify that there is an emergency which requires immediate action. Congress could undo that by legislation, but we, I think, want to at least foresee the possibility of such an emergency. We do it all the time in the legislative process. Last night we did it. The majority leader talked about the possibility of an emergency in Lebanon being the reason why we might not be able to go out on Friday for the week recess.

I would think whichever amendment we adopt has got to have some provision for emergency certification by the agency head.

Senator **Grassley**. Well, I would like to ask one last thing before I go to Senator Heflin.

According to the Department of Justice, the 30-day plus 60-day delay mechanism in S. 1650 presents a presentment clause problem. Do you agree or disagree with that?

Senator **Levin**. I do not agree at all, but it is easily correctable. If there is any consensus that they are right on that, it is very simple to correct. We just simply make it an automatic delay rather than one triggered by a committee.

The provision calls for a committee triggering a delay. To me that is an internal mechanism to permit the legislative process to function. The committee is not vetoing it; all it is doing is holding it up 30 days so that the normal legislative joint resolution process can function with the expedited procedure.

I view that as an internal mechanism, an administrative mechanism for the Congress. And in no way do I view that as a violation of the presentment clause or *Chadha*. But if there was any consensus around here that it did create a problem, we could just remove the committee trigger and have an automatic 60- or 90-day delay for all regulations, and then take it from there.

Senator **Grassley**. Senator Heflin.

Senator **Heflin**. Well, on that same subject we had an earlier experience with the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure where we were looking within a 4-month timeframe. The House told us that the staff was going to take steps to allow us to consider it during that period of time.

Something happened with the staff of the Judiciary Committee and it never got done. You had a 4-month period and that was back before the *Chadha* decision as to holding it at that time. Somebody on the staff either slipped or else there was a situation which caused a problem with the joint relationship of the House and the Senate, and it did not move within the time period.

Those time periods can move fast and there should be some sort of triggering mechanism to let the committee take some action to give public consideration.

Senator LEVIN. Well, a committee trigger is included, as you know, Senator Heflin, in our amendment, a committee trigger. We think it is totally consistent with *Chadha*. All it is again is an internal mechanism to permit congressional functions to occur. It is not purporting to be legislation or committee veto. So, I agree with you; it is important there be a committee trigger if it is constitutional.

Senator HEFLIN. Now let's consider the proposal which would require a joint resolution of approval for major rules, and a joint resolution of disapproval for nonmajor rules. Now, you were saying as you interpret it, a major rule would not be subject to amendment.

Now, I suppose the concept of expedited procedure is necessary to ensure that there is not a great deal of amending processes which would bring about a considerable delay. Do you see any problem with providing some type of a limited amending right that could be added to major rules?

Senator LEVIN. I see a policy problem with it. The deeper Congress gets into amending regulations, the more it is substituting itself for the regulatory agency. And I think that is what we ought to avoid doing. We should not blur the distinction between us.

We should veto what they have done if we do not like it and say, "Do it over again and submit it to us again." But I do not think we ought to——

Senator HEFLIN. If you are going to approve or disapprove the rule, you have immersed yourself into the issue.

Senator LEVIN. You have. You have indeed, but not as deeply.

Senator HEFLIN. The amending process is particularly designed not necessarily to change, but to straighten out some things that the regulatory agency did not carefully consider. I do not think by providing an amending procedure you are immersing yourself any deeper. You are already into the issue of whether or not Congress should invade the province of a regulatory agency.

But it seems that a limited—and I am not saying at this time how I would define a limited amendatory right—amendatory right might well be a corrective way of doing it.

But you are saying you immerse yourself deeper. All right. What other reasons would you have against some sort of limited amendatory right in looking at a major rule?

Senator LEVIN. Well, I am not saying that I would oppose it. I am saying there are pros and cons to it. One of the positive parts about it is that at least then it is not a one-house veto in effect. One of the problems with the way it is written is that it obviously is doing indirectly what *Chadha* said you cannot do directly. If you cannot amend the darn thing, then it is just a one-house veto under another name.

If you can amend it you avoid that problem. It becomes more of a true legislative process on its own.

Now, going back to my comment about the immersion, I think it is very different to write a rule in the first instance than it is to judge a rule. I think a court's function in judging a rule—for instance, does it comply with congressional intent—is a very different function from the regulatory agencies writing that rule.

A court looks at the rule and asks: "Does it or does it not meet certain standards?" It is immersing itself, obviously, but it is a different function. It is not writing the rule.

Now, I think it is very different to tell Congress——

Senator HEFLIN. Anytime you get into the right to have a legislative veto and you either exercise it on a major rule or you fail to exercise a joint resolution of disapproval, the argument is going to be that Congress gave, either by action or inaction, their approval, that it was within the parameters of what they had previously delegated.

Senator LEVIN. I agree with that.

Senator HEFLIN. If something was discussed and it was voted down in one house it is not necessarily conclusive of legislative intent.

This is a matter that you are going to be faced with in one way or the other. Some courts may construe it in that manner. But I do not know whether the amendatory process should be limited in the path that a major rule goes.

What happens if there is something that obviously could be corrected? You do not have that right. Something could possibly arise after the rule leaves the regulatory agency. I just think it is something to be considered.

Senator LEVIN. I would agree.

Senator HEFLIN. It does eliminate your argument of a one-house veto if you have the amendatory right.

Senator LEVIN. I think it does. If it is a substantive amendatory right, I think it would perhaps—and I say perhaps because I want to think further about it—but it would perhaps eliminate the one-house veto argument.

But again you have served as a judge and I have not. I think approving or disapproving a rule, whether we go with approval or whether we go with disapproval, whichever route we go, by some standard is very different from rewriting a rule, very different. One is a different process, a different function and what I call the deeper immersion. But it is also a different immersion.

And I would think that it is going to take the Congress a lot more time and plunge it into a different process. When you tell Congress to write the rule on toxic substances, I mean, my heavens, it took that agency 3 years and 5,000 pages of hearings and 4,300 pieces of paper in its file and God knows what else and hearing officers and everything else to come up with a proposed regulation. That is an important function.

Now, if Congress is going to rewrite that rule, that is very different from judging whether or not that rule should be approved or disapproved by some standard. Rewriting a rule or writing it ab initio is very different from judging whether it should be approved or disapproved by some standard. Whether we are a court or whether we are a legislative body deciding to exercise a veto.

And here I am not differentiating between whether it is an affirmative or a negative veto because either one, it seems to me, is different from writing or rewriting the rule.

Senator HEFLIN. Now, on the major rule aspect where the designation that a rule is major is made by the agency or the President or his delegate, you raise the issue of OMB being placed in a position requiring a joint resolution of approval as opposed to the negation of the rule; and you raise it primarily in the context of independent agencies. I do not know. There may be interdepartment rivalries and rivalries between directors of departments. Maybe the President had not decided that. Is this making OMB a superpower or a superagency by allowing OMB some additional power over an agency? I mean, it gives them a control maybe that Congress never intended the President or OMB to have.

But as to other agencies or departments—and there are differences that exist in administrations. I believe we have Feldstein and Secretary of the Treasury Regan differing on a few things today.

Senator LEVIN. Today, yes. Yesterday I heard no.

Senator HEFLIN. Is that it? [Laughter.]

But I do not know. You raise an interesting issue. I go beyond your independent agency argument and wonder whether there should be some type of language relative to the agency itself. What it amounts to in effect is entirely a discretionary rule.

They write a rule and they say because of the potential impact of the rule on the economy, its route has to be approval rather than disapproval, which is a tough row to hoe sometimes. I think you raise a point that is worth further study and perhaps we ought to try to develop some mechanism.

I can see where a dollar and cents, economic impact alone may be insufficient and something else may be needed, but I am not sure that vesting the authority within one or two or three individuals as to that is appropriate or wise.

Senator LEVIN. Relative to the executive branch agencies?

Senator HEFLIN. Yes. I would think we should develop some sort of restraints, or maybe have a joint determination.

Senator LEVIN. Senator Heflin, I happen to agree with you that there have to be some standards on the exercise of the executive review of executive branch rules. I happen to support that if there are some standards. Senator Rudman and I on the floor of the Senate were able to get an amendment adopted about a year and a half ago, I believe, which permitted OMB under certain circumstances to review these executive branch rules.

I happen to agree with the thrust of your comment, that it needs some real attention. The main part of my comment related, however, to those independent agencies because there we would be giving, for the first time, power to the President over the rules of independent agencies. That is a radical departure. That is modifying what OMB now does over executive branch agencies, which could use some modification, and which with modification I think is wise. That would give a President the power to veto up to 75 regulations, that he could designate, of an independent agency. And I do not think Congress ever intended, as you just said, nor do I think it is wise that we give that power to a President.

It does not make any difference who the President is. It has nothing to do with whether it is this President or another President.

Senator **Grassley**. We have already voted on that issue. That is part of 1080. You know, I mean, that has passed the Senate.

Senator **Levin**. No. I do not think it applied—I do not think that we gave the President the veto power over the regulations of independent agencies.

Senator **Heflin**. Your presentation of the effect on independent agencies is the first time I have heard that articulated in a chamber of the Congress.

Senator **Levin**. Well, it is a rather new provision here; I think that, perhaps, is why. I think we have always assumed that the President would not have this kind of power. I do not think the Congress has ever given the President the power over rules of independent agencies.

Senator **Grassley**. 1080, though, gives the President the authority through the cost-benefit analysis procedure to make major rule designations which in turn would make the rule subject to an approval process.

Senator **Levin**. Not to veto the regulations.

Senator **Grassley**. No.

Senator **Levin**. Just to do analysis, sure.

Senator **Grassley**. The result under your procedure is to subject Congress to the extraordinary lengths of exercising a veto override if it does not like the rule. The question remains as to what happens if Congress does not want the rule. If the President wants it, we will most likely be stuck with it.

Senator **Levin**. But there is no veto over their rules. That is what I am saying. Here for the first time is a veto over their rules.

Requiring a cost-benefit analysis, frankly, is one thing, but vetoing a rule is something very different.

Senator **Heflin**. That is all.

Senator **Grassley**. Just one last comment and it relates to a previous point regarding emergency rules. My bill provides for judicial review of emergency rule designation and yours does not.

So I do agree with you on the emergency rule situation, that you have to have opportunities for that. But I would assume that a bureaucrat is going to take every opportunity whenever he can to get around congressional review, and there is just really no check on his actions without some sort of judicial review of an emergency rule designation. He can call a rule an emergency rule, be exempt from congressional review and Congress has no recourse.

Senator **Levin**. I am going to review our bill relative to the absence of judicial review of that emergency procedure to see if we should not improve it along the lines that you have outlined.

Senator **Grassley**. Thank you. Well, in closing, anytime between now and the time these issues come up on the floor of the Senate for discussion, I would be happy to visit with you regarding details of trying to work out any details.

Senator **Levin**. Again, let me commend you, Mr. Chairman. Again, we do have some differences on how to achieve a result. I think we are in very close agreement that we must act, not just because of *Chadha,* but even if *Chadha* had not been adopted by the court. We still have long believed together with other members of this Senate that we must move very strongly in this area.

And even though our paths have diverged somewhat, their general direction is still the same. We want strong action over agencies. Both these approaches do it. There are advantages and disadvantages to each, and I again look forward to working with you, hopefully, to reach some resolution. But if not, at some point we may say we have really cleaned up the problem.

Senator **GRASSLEY**. Well, let me thank you finally for the 1 hour that you have given to this discussion this morning on top of the many, many other hours you have given over the last several years. To know there are very important committees you serve on that are meeting right now. And thank you for taking time from them to be with us.

Senator **LEVIN**. Thanks to you and to your staff who have also been very helpful to us.

Senator **GRASSLEY**. Thank you. I would now like to call a panel of my colleagues or former colleagues of mine from the time I spent in the House of Representatives. These gentlemen are strong leaders for responsible government.

I think their testimony this morning is going to indicate that. Unfortunately, Congressman Lott cannot be with us this morning as he has a budget deficit meeting; however, we will submit his statement for the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF REPRESENTATIVE TRENT LOTT

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I AM GRATEFUL FOR THIS OPPORTUNITY TODAY TO TESTIFY IN SUPPORT OF SENATOR GRASSLEY'S AMENDMENT TO S. 1080, THE "REGULATORY REFORM ACT," PROVIDING AN ALTERNATIVE TO THE TWO-HOUSE LEGISLATIVE VETO FOR REGULATIONS. BEFORE I GET INTO THE SPECIFICS OF THE AMENDMENT, LET ME REAFFIRM MY OWN SUPPORT FOR THE ENTIRE BILL WHICH PASSED THE SENATE OVERWHELMINGLY IN THE LAST CONGRESS, BUT WAS NEVER BROUGHT TO A VOTE IN THE HOUSE. REGULATORY REFORM IS AN ISSUE WHICH HAS BEEN PERCOLATING IN THE CONGRESS FOR SEVERAL YEARS NOW, AND I THINK IT'S EXTREMELY REGRETTABLE THAT WE HAVE NOT YET ENACTED A GENERIC REGULATORY REFORM BILL INTO LAW GIVEN THE WIDESPREAD SUPPORT FOR SUCH LEGISLATION BOTH WITHIN THE CONGRESS AND ACROSS THE NATION.

I ESPECIALLY WANT TO COMMEND THIS COMMITTEE AND ITS CHAIRMAN FOR YOUR DILIGENCE AND PERSISTENCE IN THIS EFFORT OVER THE YEARS. I HOPE YOU WILL AGAIN BE SUCCESSFUL IN PASSING YOUR BILL IN THE SENATE EARLY IN THIS SESSION SO WE CAN TURN-UP THE HEAT IN THE HOUSE WHERE ENTHUSIASM AMONG THE POWERS THAT BE HAS BEEN LESS THAN LUKE-WARM. I DO NOT AGREE WITH THOSE WHO THINK THIS EFFORT CAN AND SHOULD BE CARRIED-ON UNILATERALLY BY THE ADMINISTRATION THROUGH ITS EXECUTIVE ORDER. IN THE FIRST PLACE, THERE IS NO ASSURANCE WE WILL ALWAYS HAVE SUCH REGULATORY REFORM CONSCIOUS ADMINISTRATIONS IN POWER. IN THE SECOND PLACE, ITS EXECUTIVE ORDER DOES NOT APPLY TO THE INDEPENDENT REGULATORY AGENCIES AND FOR THAT REASON IT IS NECESSARY TO EXTEND SUCH REGULATORY IMPROVEMENTS BY CODIFYING THEM IN PERMANENT LAW. AND THIRDLY, THE ADMINISTRATION'S EFFORTS DO NOT INVOLVE CONGRESS IN THE PROCESS, AND I THINK WE HAVE A VERY LEGITIMATE OVERSIGHT AND REVIEW ROLE TO PLAY WHEN IT COMES TO DELEGATING OUR LAWMAKING POWERS TO THE REGULATORY BUREAUCRATS.

THIS IN TURN BRINGS ME TO THE SUBJECT OF SENATOR GRASSLEY'S LEGISLATIVE VETO ALTERNATIVE AMENDMENT NO. 2655 TO S. 1080 AS PUBLISHED IN THE NOVEMBER 18TH CONGRESSIONAL RECORD. THIS AMENDMENT HAS BEEN NECESSITATED BY THE SUPREME COURT'S JUNE 23RD DECISION IN INS V. CHADHA HOLDING THE TRADITIONAL ONE- AND two-House legislative vetoes unconstitutional. S. 1080 as passed by the Senate in the last Congress and reintroduced on April 19th of last year contained a two-House veto for regulations. I will not dwell here on my quarrel with the Chadha decision. Suffice it to say that I found myself more in agreement with Justice White's brilliant dissent than with the majority's opinion in that case. The paradox of the Chadha decision, as Justice White points out in his dissent, is that while Congress has now been deprived of reserving a check on the lawmaking power it delegates to independent and Executive agencies through the rulemaking process, the agencies in turn may now issue regulations "having the force of law without bicameral approval and without the President's signature." It is difficult to believe that the Framers of the Constitution ever contemplated granting unelected bureaucrats Article I lawmaking powers without the particpation of either the President or the Congress.

Nevertheless, Chadha is now the law of the land and we must now set about to recapture our legitimate role in the lawmaking process. I am not comforted by the alternatives suggested by some for this post-Chadha situation. We are blithely told that we should delegate less and legislate with more precision. While this may be possible in some cases, it ignores the realities of the modern administrative and technocratic state. We in the Congress do not have the competence, time or political cohesion necessary to legislatively assume all the authority we have delegated to the Executive Branch.

If you accept as I do that regulations will always be a necessary corollary to most of the legislation we enact, then you must decide whether you want to retain some kind of check over this delegation of legislative powers, close to the source, and before the damage is done, or whether you think it is sufficient to apply our traditional oversight and legislative powers to these situations after-the-fact. The beauty of the legislative veto device was that it allowed the Congress to intervene in a timely and efficient fashion if it wanted to, before the Executive action actually took effect. I think

THE SAME ARGUMENT EXISTS TODAY AS IT DID PRIOR TO CHADHA FOR SUCH AN EARLY INTEVENTION MECHANISM.

I THEREFORE THINK SENATOR GRASSLEY'S AMENDMENT, CALLING FOR APPROVAL OF MAJOR REGULATIONS, AND PERMITTING DISAPPROVAL OF NONMAJOR REGULATIONS, BY ENACTMENT OF A JOINT RESOLUTION WITHIN A 90-DAY REVIEW PERIOD,IS IDEALLY SUITED TO RETAINING THIS CONGRESSIONAL CHECK ON THE REGULATORY PROCESS.

THE AMENDMENT IS SIMILAR TO THE LEGISLATIVE VETO ALTERNATIVE I HAVE PROPOSED IN H.R. 3939, THE "REGULATORY OVERSIGHT AND CONTROL ACT OF 1983," WHICH NOW HAS SOME 77 HOUSE COSPONSORS.

ESSENTIAL TO BOTH PROPOSALS, IT SEEMS TO ME, ARE THE EXPEDITED PROCEDURES PROVIDED FOR BOTH APPROVAL AND DISAPPROVAL RESOLUTIONS. IN THE CASE OF MAJOR RULE RESOLUTIONS, WHICH REQUIRE ENACTMENT IF THE REGULATIONS CAN TAKE EFFECT, THE INTRODUCTION OF APPROVAL RESOLUTIONS IS MANDATORY, AS IS REPORTING BY THE COMMITTEES OF JURISDICTION WITHIN 45-DAYS. IF A COMMITTEE DOES NOT REPORT, IT IS AUTOMATICALLY DISCHARGED. THIS IS TO ENSURE THAT BOTH HOUSES WILL HAVE AN OPPORTUNITY TO VOTE ON THE PROPOSED REGULATION AND THAT IT CANNOT SIMPLY BE BLOCKED BY COMMITTEE INACTION. THERE IS PRECEDENT FOR THIS MANDATORY REPORTING AND AUTOMATIC DISCHARGE DEVICE IN AT LEAST SIX EXISTING LEGISLATIVE VETO STATUTES, INCLUDING THE EXECUTIVE REORGANIZATION ACT, THE NUCLEAR NONPROLIFERATION ACT, THE TRADE ACT, ARMS CONTROL ACT, MX MISSILE APPROVAL, AND THE NUCLEAR WASTE ACT.

FOR NONMAJOR RULE RESOLUTIONS, WHILE THERE WOULD NOT BE AUTOMATIC DISCHARGE IF A COMMITTEE HAS NOT REPORTED, A DISCHARGE MOTION WOULD BE IN ORDER IF A COMMITTEE HAS NOT REPORTED WITHIN 30-DAYS AFTER THE RULE IS SUBMITTED, AND ONE-FOURTH OF THE MEMBERSHIP SUPPORTS IN WRITING THE OFFERING OF A DISCHARGE MOTION. THIS PROVISION IN SENATOR GRASSLEY'S AMENDMENT DIFFERS SOMEWHAT FROM MY BILL IN THAT I PROVIDE A "MOTION FOR CONSIDERATION" IN WRITING, WHEREBY ONE-FOURTH OF THE MEMBERSHIP CAN FORCE A COMMITTEE TO REVIEW THE RULE AND REPORT A RESOLUTION. IF THE COMMITTEE DOES NOT THEN REPORT WITHIN 45-DAYS AFTER

THE RULE IS SUBMITTED, THE RESOLUTION IS AUTOMATICALLY DISCHARGED. THIS FRONT-END DISCHARGE MECHANISM, IT SEEMS TO ME, HAS THE ADVANTAGE OF GIVING A COMMITTEE ADVANCE NOTICE OF SIGNIFICANT MEMBERSHIP SUPPORT FOR A DISAPPROVAL RESOLUTION, AND GIVES BOTH HOUSES THE BENEFIT OF A COMMITTEE REPORT ON WHICH TO BASE ITS JUDGMENT. BUT I DEFER TO YOUR JUDGMENT ON THIS SUBCOMMITTEE IN PRESCRIBING RULES OF PROCEDURE FOR THE SENATE.

IN CONCLUSION, MR. CHAIRMAN, I WANT TO THANK YOU FOR APPEARING BEFORE OUR HOUSE RULES COMMITTEE IN SUPPORT OF THIS LEGISLATIVE VETO ALTERNATIVE FOR REGULATIONS DURING OUR GENERAL HEARINGS ON THE POST-CHADHA CONGRESS. I WISH I COULD SAY WITH CONFIDENCE THAT OUR COMBINED TESTIMONIES HAD PERSUADED THE RULES AND JUDICIARY COMMITTEES OF THE HOUSE TO IMMEDIATELY REPORT SUCH LEGISLATION, BUT I GET THE SENSE THAT THERE IS MORE OF A PROCLIVITY ON THE PART OF SOME IN THE HOUSE TO STUDY THE PROBLEM MORE THAN THERE IS TO DO SOMETHING ABOUT IT. AS YOU ARE AWARE FROM YOUR OWN HEARINGS LAST YEAR, CONGRESSMAN SAM HALL IS PLANNING TO INTRODUCE AN EVEN MORE WATERED-DOWN REGULATORY REFORM BILL THIS MONTH THAT MAY NOT EVEN INCLUDE A LEGISLATIVE VETO ALTERNATIVE. SO I APPEAR BEFORE YOU TODAY TO PLEAD THAT YOU AGAIN TAKE THE INITIATIVE IN THIS AREA AND HOPEFULLY BY YOUR ACTIONS YOU WILL PROD THE HOUSE TO MOVE INTO THE VAST AND DANGEROUS VACUUM THAT HAS BEEN LEFT BY THE CHADHA DECISION. WITHOUT BOLD AND COMPREHENSIVE RESPONSES TO THE LOSS OF THE LEGISLATIVE VETO, I FEAR WE WILL AGAIN WITNESS A PROLIFERATION OF COMPLEX, CONFUSING AND CONFLICTING, HALF-HEARTED ATTEMPTS TO PLUG THE DIKE. THANK YOU.

Senator **Grassley**. We have Congressman Broyhill from North Carolina. He is the ranking minority member of the House Energy and Commerce Committee and maintains an active interest in legislative veto.

Congressman Levitas is here with us this morning and will join us on the same panel. His name is synonymous with the term legislative veto. I do not know how many times I have had an opportunity to vote for his amendments when I was a Member of the House of Representatives. Congressman Levitas continues to lead the fight for responsible rulemaking in the House of Representatives. And I would remind you that your testimony will be included in toto, and if you summarize, it will be fine. But I do not want to have any sort of procedures we have here inhibit you in any way from presenting your case.

Would you proceed, Congressman Broyhill.

STATEMENTS OF HON. JAMES BROYHILL, A U.S. REPRESENTATIVE FROM THE STATE OF NORTH CAROLINA; AND HON. ELLIOTT LEVITAS, A U.S. REPRESENTATIVE FROM THE STATE OF GEORGIA

Mr. **Broyhill**. Thank you very much, Mr. Chairman. I am most appreciative of the invitation to come and to testify today on this most important and timely subject.

Certainly, I am mindful, and I am sure that the gentleman from Georgia is also, of time constraints. As you know, we, on the House side, have learned how to keep our remarks within the 5-minute rule.

Senator **Grassley**. And you do not know how nice it is to be in the Senate and not have that rule to abide by.

Mr. **Broyhill**. I feel the need for comprehensive regulatory reform legislation is urgent. All Members on both sides of the aisle and both sides of the Capitol recognize that. The Senator who just preceded us so eloquently described the situation. The Federal bureaucracy continues to grow, and as it does, so does the number and the complexity of the rules and regulations that they are writing.

Of course, the cost to the public, to industry, to commerce, to consumers is enormous. We are told the figure is costing the economy as much as $100 billion to $200 billion per year.

If an economic recovery is going to be achieved, it seems to me that we must do something about regulatory reform. All of us know that these regulations have the full force and effect of law. The implications of that are enormous.

Congress has, in effect, created through the laws that we have written a fourth branch of government. Oftentimes the boiler plate language that we put into these laws—such as the secretary, the director or the administrator, as the case may be, shall have the authority to write rules and regulations to carry out the force and effect of this law—that gives the bureaucracy enormous powers.

This fourth branch has the authority to promulgate regulations that apply to entire industries across the board from small business to large conglomerates. These regulations can even reach into matters of State concern and even override State law. I therefore commend you, Mr. Chairman, and the members of this committee for taking a lead in trying to do something about this situation.

We all know, of course, that Congress has utilized the legislative veto device in the past. The gentleman from Georgia and I have been part of a bipartisan effort to try to insert legislative veto provisions into various laws, including those relating to the FTC, as well as others.

We have had a measure of success. However, we do need to do something about putting this into an omnibus law, due to the effect of the *Chadha* decision. The Supreme Court's *Chadha* decision means that the Congress is relatively powerless to review regulations, in a timely fashion, that are being issued by agencies. So, it is critical that the Congress act on the bill that you have introduced and/or the legislative approval and disapproval procedure that you have recommended be added to that.

As you well know, your amendment is very similar to that which is seen in the bill H.R. 3939 that has been introduced by Congressman Lott, who perhaps may come and testify before this subcommittee at a later time.

I think that meaningful congressional review of regulations which will have a substantial impact on the economy should be subjected to what I call an approval process. Regulations that would lead to a substantial increase in costs to consumers, increase in the cost of doing business or could have an adverse effect on competition, the environment, or an impact on public health and safety, it seems to me that the Congress should be looking over the end work product of these agencies with respect to these regulations and that we should not only review them but should have the power to approve them.

This, it seems to me, is the proper approach. Let me make this comment, Mr. Chairman. One of the arguments that I have heard on our side of the Capitol is that this type of process would not be constitutional. I submit this type of process would be constitutional, since it does satisfy the requirements of the Supreme Court decision of bicameralism and presentment to the President.

Another, criticism that has been voiced in opposition to the approval process, is that enactment of a joint resolution approving the substance of a regulation would shield the regulation from judicial review under the Administrative Procedures Act.

I maintain that this criticism is without merit for two reasons: First, as a matter of legal interpretation, the joint resolution of approval does not enact the text of the regulation itself into law. It simply indicates congressional approval of the agency action.

Second, I would point out the section 808 of your amendment states, and I quote:

> The enactment of an appropriate resolution approving a major rule shall not be construed to create any presumption of validity with respect to such rule and shall not affect the judicial review of the rule under Chapter Seven of this title.

I submit that this language would leave little doubt as to the continued ability of the courts to review regulations after they have been approved by Congress.

Mr. Chairman, I would like to submit my statement for the record, and have submitted to the staff and I hope that it is before you today, a legal memorandum prepared by the Congressional Research Service which confirms this analysis. I would also like it to be made a part of the record.

Senator **Grassley**. Without objection they will be made a part of the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF REPRESENTATIVE JAMES T. BROYHILL

I WOULD INITIALLY LIKE TO THANK THE CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE FOR THE OPPORTUNITY TO TESTIFY THIS MORNING. IT IS A PLEASURE TO BE HERE.

THE URGENT NEED FOR COMPREHENSIVE REGULATORY REFORM LEGISLATION IS SOMETHING WE ALL RECOGNIZE. AS THE FEDERAL BUREAUCRACY CONTINUES TO GROW, SO DOES THE NUMBER AND COMPLEXITY OF FEDERAL REGULATIONS. IT IS ESTIMATED THAT THE COST OF FEDERAL REGULATION ON THE ECONOMY AMOUNTS TO MORE THAN $100 BILLION A YEAR. UNNECESSARY OR DUPLICATIVE REGULATION INHIBITS ECONOMIC GROWTH AND ENHANCES INFLATIONARY PRESSURES. IF AN ECONOMIC RECOVERY IS TO BE TRULY ACHIEVED, THE SYSTEM OF REGULATION MUST BE SIMPLIFIED AND MADE MORE EFFICIENT.

AS WE ALL KNOW, REGULATIONS ISSUED BY INDEPENDENT AND EXECUTIVE AGENCIES HAVE THE FULL FORCE AND EFFECT OF LAW. THE IMPLICATIONS OF THIS ARE ENORMOUS. CONGRESS HAS GIVEN THIS "FOURTH BRANCH" OF GOVERNMENT, AS IT IS OFTEN CALLED, THE AUTHORITY TO PROMULGATE REGULATIONS WHICH CAN APPLY TO ENTIRE INDUSTRIES ACROSS THE BOARD - FROM SMALL BUSINESS TO LARGE CONGLOMERATES - AND CAN REACH INTO MATTERS OF STATE CONCERN AND EVEN OVERRIDE STATE STATUTES.

TO ENSURE REGULATIONS OF SUCH MAGNITUDE ARE DESIGNED IN A WAY THAT IS CONSISTENT WITH CONGRESSIONAL INTENT, WE MUST HAVE A MECHANISM TO REVIEW AND, IF NECESSARY, CONTROL WHETHER THEY WILL TAKE EFFECT. THE LEGISLATIVE VETO DEVICE GAVE CONGRESS THAT ABILITY. IT WAS A QUICK AND SIMPLE WAY FOR CONGRESS TO CHECK THE EXERCISE OF THE UNBRIDLED AUTHORITY OF REGULATORY AGENCIES. IT WAS AN EFFECTIVE TOOL TO ENSURE AGENCY ACCOUNTABILITY AND RESPONSIVENESS TO THE CONGRESS.

THE SUPREME COURT'S DECISION IN IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA HAS EFFECTIVELY ELIMINATED ANY FURTHER USE OF LEGISLATIVE VETO. THE COURT'S STRICT CONSTRUCTION OF THE BICAMERAL AND PRESENTMENT REQUIREMENTS OF THE CONSTITUTION IGNORES THE NEEDS OF A MODERN AND COMPLEX FEDERAL GOVERNMENT. IT IS SOMEWHAT IRONIC THAT NOW, WITHOUT THE VETO DEVICE, APPOINTED OFFICIALS CAN ISSUE REGULATIONS WHICH HAVE THE EFFECT OF LAW, WHILE THE ELECTED CONGRESS, WITH THE CONSTITUTIONAL ROLE OF LAWMAKER, IS POWERLESS TO REVIEW THOSE REGULATIONS IN A TIMELY FASHION.

ACCORDINGLY, IT IS CRITICAL THAT CONGRESS ACT EXPEDITIOUSLY TO FILL THE VOID THAT HAS BEEN LEFT BY THIS DECISION AND TO RESUME OUR PROPER RULE OF OVERSEEING THE REGULATORY ACTIVITIES OF THESE AGENCIES.

IT IS FOR THIS VERY IMPORTANT REASON THAT I AM HERE TODAY TO EXPRESS MY STRONG SUPPORT FOR CHAIRMAN GRASSLEY'S AMENDMENT TO S. 1080, PROVIDING FOR LEGISLATIVE REVIEW OF REGULATIONS ISSUED BY INDEPENDENT AND EXECUTIVE AGENCIES. THIS AMENDMENT IS VERY SIMILAR TO THAT WHICH IS CONTAINED IN CONGRESSMAN TRENT LOTT'S BILL, H.R. 3939, OF WHICH I AM A COSPONSOR.

THIS REVIEW MECHANISM IS A "HYBRID" DEVICE. IT PROVIDES THAT "MAJOR RULES", WHICH BY DEFINITION HAVE A SUBSTANTIAL ECONOMIC IMPACT, CANNOT TAKE LEGAL EFFECT UNTIL EXPRESSLY APPROVED BY CONGRESS. ALL OTHER RULES CAN TAKE EFFECT WITHOUT CONGRESSIONAL INVOLVEMENT, UNLESS CONGRESS INTERCEDES AND EXPRESSLY DISAPPROVES THEM.

MEANINGFUL CONGRESSIONAL REVIEW OF REGULATIONS, WHICH WOULD HAVE A SUBSTANTIAL IMPACT ON THE ECONOMY, IS BEST ACCOMPLISHED BY MEANS OF AN APPROVAL PROCESS. REGULATIONS WHICH

COULD LEAD TO A SUBSTANTIAL INCREASE IN COSTS FOR CONSUMERS, OR COULD HAVE AN ADVERSE EFFECT ON COMPETITION, THE ENVIRONMENT, OR THE PUBLIC HEALTH OR SAFETY ARE PROPERLY WITHIN THE PURVIEW OF CONGRESS, AS LAWMAKERS, TO REVIEW AND APPROVE.

UNDER THIS TYPE OF APPROACH, A REGULATION IS TREATED AS A "RECOMMENDATION" OF THE AGENCY, DEVELOPED AFTER CAREFUL CONSIDERATION BY THE AGENCY WITH EXPERTISE IN THE AREA IN QUESTION. CONGRESS WOULD STILL BE UTILIZING THE EXPERTISE OF REGULATORY AGENCIES, BUT WOULD SIMPLY BE ABLE TO REVIEW ITS REGULATORY "END PRODUCT", BEFORE IT HAS THE FORCE AND EFFECT OF LAW.

CONGRESS WOULD BE GIVEN A FIXED TIME PERIOD IN WHICH TO REVIEW THE REGULATION AND PASS A JOINT RESOLUTION APPROVING ITS SUBSTANCE. WHEN SIGNED BY THE PRESIDENT, OR PASSED BY A TWO-THIRDS MAJORITY OF THE CONGRESS, THE REGULATION COULD THEN TAKE THE FULL FORCE AND EFFECT OF LAW.

THIS TYPE OF PROCESS WOULD BE CONSTITUTIONAL, SINCE IT SATISFIES THE CONSTITUTIONAL REQUIREMENTS OF BICAMERALISM AND PRESENTMENT, ENUNCIATED BY THE SUPREME COURT IN THE CHADHA DECISION.

ONE CRITICISM THAT HAS BEEN VOICED IN OPPOSITION TO THE APPROVAL PROCESS IS THAT ENACTMENT OF A JOINT RESOLUTION APPROVING THE SUBSTANCE OF A REGULATION WILL SHIELD THAT REGULATION FROM JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA). THIS CRITICISM IS WITHOUT MERIT FOR TWO REASONS.

FIRST, AS A MATTER OF LEGAL INTERPRETATION, THE JOINT RESOLUTION OF APPROVAL DOES NOT ENACT THE TEXT OF THE REGULATION

ITSELF INTO LAW. IT SIMPLY INDICATES CONGRESSIONAL APPROVAL OF THE REGULATION'S SUBSTANCE.

SECONDLY, SECTION 808 OF THE CHAIRMAN'S AMENDMENT EXPLICITLY STATES:

> THE ENACTMENT OF AN APPROPRIATE RESOLUTION APPROVING A MAJOR RULE SHALL NOT BE CONSTRUED TO CREATE ANY PRESUMPTION OF VALIDITY WITH RESPECT TO SUCH RULE, AND SHALL NOT AFFECT THE JUDICIAL REVIEW OF THE RULE UNDER CHAPTER 7 OF THIS TITLE.

THIS LANGUAGE WOULD LEAVE LITTLE DOUBT AS TO THE CONTINUED ABILITY OF THE COURTS TO REVIEW REGULATIONS AFTER THEY ARE APPROVED BY CONGRESS.

ON THIS ISSUE, I WOULD LIKE TO SUBMIT A LEGAL MEMORANDUM PREPARED BY THE CONGRESSIONAL RESEARCH SERVICE WHICH CONFIRMS THIS ANALYSIS.

THE EFFECT OF THE SUPREME COURT'S DECISION IN CHADHA WAS TO ALTER THE DELICATE BALANCE THAT WAS STRUCK BETWEEN THE CONGRESS AND THE REGULATORY AGENCIES MADE POSSIBLE BY LEGISLATIVE VETO. THE APPROVAL PROCESS WILL CORRECT THAT "IMBALANCE" AND WILL REESTABLISH THE STATUS QUO THAT EXISTED BEFORE VETO WAS FOUND TO BE UNCONSTITUTIONAL.

NOW THAT THE PRESIDENT MUST NECESSARILY BE INVOLVED IN THE LEGISLATIVE REVIEW PROCESS, AN APPROVAL DEVICE MORE CLOSELY TRACKS WHAT A DISAPPROVAL DEVICE PREVIOUSLY ACCOMPLISHED - PLACING CONGRESS IN CONTROL OF THE REVIEW OF REGULATORY ACTIVITIES.

UNDER THE CHAIRMAN'S AMENDMENT, REGULATIONS WHICH ARE NOT OF THE "MAJOR" TYPE CAN TAKE EFFECT, UNLESS CONGRESS ACTS TO DISAPPROVE THEM WITHIN A SPECIFIED TIME FRAME. THESE REGULATIONS WOULD HAVE, BY DEFINITION, LESS OF AN IMPACT ON THE ECONOMY, CONSUMERS OR THE ENVIRONMENT. THE CHAIRMAN HAS WISELY INCLUDED EXPEDITED PROCEDURES TO ENSURE THE TIMELY CONSIDERATION OF DISAPPROVAL RESOLUTIONS. IN THE CONTEXT OF A DISAPPROVAL PROCEDURE, EXPEDITED PROCEDURES ARE KEY TO A SMOOTH AND EFFICIENT REVIEW PROCESS.

SOME CRITICISM HAS BEEN VOICED THAT THE GENERIC REVIEW PROCEDURE FOR ALL AGENCY REGULATIONS WILL IMPOSE A LARGE WORKLOAD ON CONGRESS. THE ANSWER TO THIS CRITICISM IS TWOFOLD. FIRST, A HYBRID SCHEME, SUCH AS THAT CONTAINED IN THE CHAIRMAN'S AMENDMENT, WILL NOT IMPOSE AN UNWORKABLE BURDEN SINCE AFFIRMATIVE ACTION BY CONGRESS WOULD ONLY BE REQUIRED FOR THOSE REGULATIONS WHICH WOULD HAVE A SUBSTANTIAL IMPACT. IT HAS BEEN ESTIMATED THAT ROUGHLY 50 MAJOR RULES ARE ISSUED A YEAR BY INDEPENDENT AND EXECUTIVE AGENCIES. ALL OTHER REGULATIONS WILL TAKE EFFECT WITHOUT CONGRESSIONAL ACTION.

WHEN A REGULATION HAS THE POTENTIAL OF HAVING A SUBSTANTIAL EFFECT ON THE ECONOMY, CONGRESS, IN CARRYING OUT ITS CONSTITUTIONALITY PRESCRIBED LEGISLATIVE RESPONSIBILITIES, SHOULD HAVE A SIGNIFICANT ROLE TO PLAY IN DETERMINING THAT REGULATION'S EFFECTIVENESS.

SECOND, AS THE CHAIRMAN STATED UPON THE INTRODUCTION OF HIS AMENDMENT:

> IF WE DO NOT HAVE SUCH A SYSTEM, WE WILL BE FACED WITH WRITING MUCH MORE DETAILED LEGISLATION INITIALLY, TO PROVIDE MORE

SPECIFIC STANDARDS AND POLICY DIRECTIVES TO THE AGENCIES IN THE ORIGINAL DELEGATION. THIS WOULD BE A SUBSTANTIAL BURDEN TOO, ONE WHICH WE HAVE NOT BEEN WILLING TO UNDERTAKE IN THE PAST, AND WHICH WOULD NOT MAKE ADEQUATE USE OF THE AGENCY'S EXPERTISE IN ITS OWN FIELD.

MR. CHAIRMAN, MY REMARKS HERE THIS MORNING HAVE FOCUSED PRIMARILY ON THE NEED FOR A QUICK CONGRESSIONAL RESPONSE TO THE CHADHA DECISION. AS IMPORTANT AS THIS IS, A LEGISLATIVE REVIEW DEVICE SUCH AS THE APPROVAL MECHANISM, WILL NOT BE, IN AND OF ITSELF, ENOUGH. THERE IS STILL AN OVERRIDING NEED FOR COMPREHENSIVE REGULATORY REFORM LEGISLATION TO ENSURE FULL AGENCY ACCOUNTABILITY AND RESPONSIVENESS. THE REFORM OF INTERNAL AGENCY PROCEDURES FOR RULEMAKING, AND THE ENACTMENT OF SUCH REFORMS INTO STATUTORY LAW, WILL IMPROVE THE WISDOM OF THE REGULATORY END PRODUCT.

THE CONSIDERATION OF REASONABLE ALTERNATIVES AND COST BENEFIT ANALYSIS IS KEY TO INTELLIGENT REGULATION. PERIODIC REVIEW OF REGULATIONS ON THE BOOKS ENSURES THAT UNNECESSARY OR OUTDATED REQUIREMENTS ARE NOT CONTINUED IN EFFECT.

FOR THESE REASONS, I AM HOPEFUL THAT S. 1080 CONTAINING THE CHAIRMAN'S LEGISLATIVE REVIEW MECHANISM WILL BE CONSIDERED BY THE CONGRESS EXPEDITIOUSLY.

I OFFER MY SUPPORT AND MY WILLINGNESS TO WORK TO MAKE REGULATORY REFORM A REALITY.

THANK YOU, MR. CHAIRMAN.

Congressional Research Service
The Library of Congress

THE IMPACT OF JOINT RESOLUTION OF APPROVAL OF AGENCY RULES ON JUDICIAL REVIEW OF APPROVED RULES

Richard Ehlke
Specialist in American
Public Law
American Law Division
September 22, 1983

THE IMPACT OF JOINT RESOLUTION OF APPROVAL OF AGENCY RULES ON JUDICIAL REVIEW OF APPROVED RULES

Section 5 of S. 861, the proposed Consumer Products Safety Amendments of 1983, provides that no funds called for by the Act for fiscal years 1984, 1985, or 1986 may be used by the Consumer Product Safety Commission (CPSC) "to place in effect" certain rules and regulations published by the Commission after the date of enactment of the Act unless a joint resolution approving the rule or regulation has been enacted.[1] This report will discuss possible implications of the proposal for judicial review of Commission rules and regulations that would be placed in effect under the Act.

The question - raised in debate on the provision - is whether procedural or substantive defects in an agency regulation are still susceptible to challenge by aggrieved persons after Congress has statutorily approved the regulation and permitted it to become effective.[2] Rules and regulations of the CPSC under various statutes are subject to certain procedural requisites. Thus, before promulgating a consumer product safety rule, the Commission must provide notice and opportunity to comment to interested persons, consider the viability of voluntary standards, and make detailed findings with respect to reasons for the rule and the risks to be addressed. 15 U.S.C. 2058 (1982). When proceeding under the Federal Hazardous Substances Act, on the other hand, the Commission must conduct a formal hearing and make certain findings. 12 U.S.C. 1262 (1982); see, Gulf South Insul. v. U.S. Consumer Prod. Safety Com'n, 701 F.2d 1137, 1148 (5th Cir. 1983). Both Acts also necessitate different substantive grounding and justification for regulations promulgated thereunder. Regulations of the CPSC have been successfully challenged as lacking substantial evidentiary support, Gulf South Insul., supra; Aqua Slide 'N' Dive v. CPSC, 569 F.2d 831 (5th Cir. 1978), and procedural defects can invalidate proposed agency action, Dow Chemical, USA v. Consumer Product Safety Comm., 459 F. Supp. 378 (D. La. 1978); Spring Mills, Inc. v. Consumer Product Safety Comm., 434 F. Supp. 416 (D.S.C. 1977). The question raised by the proposed joint resolution of approval procedure is whether such congressional approval insulates the rule or regulation from procedural and substantive objections which could otherwise be lodged against the rule or regulation.

---

[1] 129 Cong. Rec. H4784 (daily ed. June 29, 1983). An alternative provision, section 4 of the Act, would enable Congress to disapprove proposed Commission rules and regulations by joint resolution within 90 days of issuance of such rules and regulations. Thus, unlike section 5, Commission rules and regulations would go into effect if no joint resolution of disapproval is enacted within the 90-day period. Both provisions were placed in the bill as passed by both Houses, the differences to be resolved by the conference committee.

Since both provisions require a joint resolution to effect agency rules and regulations, the constitutional objections to the legislative veto voiced in INS v. Chadha would not seem to be present. A joint resolution is passed by both Houses and presented to the President for his approval or veto.

[2] See, 129 Cong. Rec. H4776-7, 4779 (remarks of Rep. Dingell).

If Congress had not delegated rulemaking authority to the CPSC and instead passed legislation embodying product safety rules, challengers of such rules could not argue that the congressional action was invalid for failure to provide certain procedural rights such as notice, opportunity to comment, or a hearing. The "legislative determination provides all the process that is due." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982). The legislature need not provide a hearing for persons affected by legislation nor need it articulate its reasons for particular legislation. Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); INS v. Chadha, 103 S. Ct. 2764, 2788 n. 22 (1983); Association of Nat. Advertisers, Inc. v. FTC, 627 F.2d 1151, 1165-6 (D.C. Cir. 1979); Rogin v. Bensalem TP, 616 F.2d 680, 693 (3rd Cir. 1980); Greenberg v. Bolger, 497 F. Supp. 756, 773 (E.D.N.Y. 1980).

Furthermore, the factual underpinnings of legislation are subjected to much less scrutiny in determining the rationality of a statute passed by Congress. Economic legislation that does not employ suspect classifications (i.e., race, alienage) or impinge on fundamental rights (i.e., voting) will be upheld by the courts if the legislative means are rationally related to a legitimate governmental purpose. Schweiker v. Wilson, 450 U.S. 221 (1981); U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980). Legislative efforts "to structure and accommodate 'the burdens and benefits of economic life ... come to the Court with a presumption of constitutionality, and ... the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.'" *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 83 (1978), quoting, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This standard of review for legislation is less stringent than that prescribed for product safety rules of the CPSC, which will not be upheld by a court "unless the Commission's findings ... are supported by substantial evidence on the record taken as a whole." 15 U.S.C. 2060(c); *Gulf South Insul.*, *supra*.

Judicial review of agency rulemaking in general has several prongs which are either dictated by the Administrative Procedure Act's provision for judicial review, 5 U.S.C. 706, or by the particular agency's enabling statute. Thus, a court may determine whether the agency has exceeded its statutory or constitutional authority, whether it has applied the law correctly, whether its factual findings are supportable, and whether it followed the proper procedures in promulgating a rule or taking some other action. Review of legislation may entail examining constitutional authority and determining whether a rational basis exists for the congressional action. Underlying statutory authority, correct application of statutory standards, and procedural regularity, however, play no part in judicial review of legislation. Furthermore, the scope of judicial review of an agency's factual findings is broader and entails more searching scrutiny than that afforded the factual underpinnings of legislation. As in the case of the CPSC, the agency's enabling statute may authorize a reviewing court to subject the agency's findings to a degree of review which would not be appropriate in the case of review of the legitimacy of legislation. See e.g., *Industrial Union Dept.* v. *American Petrol Inst.*, 448 U.S. 607, 656 (1980) (OSHA rules); 7 U.S.C. 136n (1982) (EPA pesticide regulations). In fact, even the least stringent standard of judicial review accorded to informal agency rulemaking or other action - the "arbitrary and capricious" standard - authorizes more critical court scrutiny than that accorded most statutes passed by Congress. Under this narrow standard of review the court considers the rationality of the agency judgment and the agency "must articulate a rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1968); *Bowman Transp. Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281 (1974). The arbitrary and capricious standard, however, is not "equivalent

[to] the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause." Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 103 S. Ct. 2856, 2866 n. 9 (1983). The necessity for agencies to create a record justification for its regulations in many cases and a court's power to review that record further distinguish judicial review of agency action from judicial review of Congress' legislative actions.

The question then is what effect a joint resolution of approval of a CPSC rule or regulation is intended to have. The language of the resolution would state merely that "the Congress approves the [rule or regulation promulgated by the Commission] and which was transmitted to the Congress on_____."[3] The resolution (and subsequent statute) would apparently not contain the language of the approved regulation. A reiteration of the regulatory language in a statute may more readily lead a court to hold that any agency procedural defects were rendered irrelevant when Congress, in effect, adopted the Commission's recommendation and enacted legislation embodying the terms of that recommendation. Passage by the legislature would seem to preclude judicial review of the propriety of the procedures that led to the agency recommendation and the congressional enactment of that recommendation. Furthermore, a court would likely apply a lenient substantive standard of review to such a piece of economic legislation.

The mere statutory statement of approval of a rule or regulation, however, is ambiguous. The joint resolution in S. 861 triggers the use of appropriated funds to implement the regulation. Congress does not adopt the language of the regulation as its own when it passes the resolution. Under such circumstances, a court might be reluctant to hold that Congress intended, in effect, to implicitly repeal the rulemaking procedures governing the CPSC in the case of a particular regulation and cut off challenges to the regulation by aggrieved parties. Would such approval, however, constitute a conclusive legislative determination that the agency was acting within its statutory authority when it published the rule thereby precluding judicial review of that question? Or would approval signal a legislative finding that substantial evidence supported the regulation? If Congress intends none of the foregoing results to flow from its joint resolution of approval, the question then becomes what is the precise purpose of using the full legislative process to place in effect CPSC rules or regulations.

The legislative history or language attached to the resolution could be used

---

3/ 129 Cong. Rec. H4784 (daily ed., June 29, 1983).

to clarify congressional intent. Congress, in other statutes has prescribed that courts should not ascribe particular legislative intent to failures to disapprove by legislative veto agency actions or regulations. See e.g., 7 U.S.C. 136w(a)(4)(D) (1982); 20 U.S.C. 1232(d) (1976). However, it has also noted in a committee report, with respect to another legislative veto provision, that in reviewing secretarial actions not vetoed that it anticipates that courts would "give appropriate weight to Congress' decision to permit the rule to go into effect." S. Rept. No. 94-516, 94th Cong., 1st Sess. 158 (1975), (veto in Motor Vehicle Information and Cost Saving Act, 15 U.S.C. 2002(a)(4)). Courts have considered congressional failure to disapprove rules as an indication of congressional intent but have not accorded such action conclusive effect. North Haven Bd. of Ed. v. Bell, 102 S. Ct. 1912, 1923-5 (1982); FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 34 (1981). See also, INS v. Chadha, 103 S. Ct. at 2796 n. 11 (dissenting opinion of Justice White) (proposing that courts look on exercises of a legislative veto as evidence of legislative intent as opposed to giving it legal effect). Thus, Congress - if it intends that the approved regulation remain open to the ordinary judicial review otherwise accorded agency regulations or if it intends otherwise - could address the issue in committee reports accompanying the joint resolution or add specific language to the resolution itself. Failure to elaborate on the precise legal effect of the joint resolution of approval risks judicial interpretation of Congress' action which may be at variance with actual congressional intent.

Richard Ehlke

Richard Ehlke
Specialist in American
Public Law
Ameican Law Division
September 22, 1983

Mr. **Broyhill**. Mr. Chairman, let me just conclude by reiterating that when a regulation has the potential of having a substantial effect on the economy, on jobs, on consumers, the Congress should carry out its constitutional, legislative responsibilities. These kinds of regulations have the force and effect of law, and Congress should carry out its responsibility to approve these agency recommedations.

It seems to me the Congress should play a far more significant and substantial role in this whole process than they have in the past.

Mr. Chairman, I think there is an overriding need for comprehensive regulatory reform legislation. I know that we today have been focusing on the need for the legislative approval of substantive rules and regulations that may come from different agencies.

But that does not take away the overriding need for comprehensive regulatory reform legislation found in your bill, and found in H.R. 3939. For example, the consideration of reasonable alternatives, to proposed regulations, a requirement of cost-benefit analysis, periodic review of regulations, and other items which are found in your proposed legislation are needed. And, as a part of this overall scheme, is a need for a tool for the Congress in order to be looking over the shoulder of these regulatory agencies.

Senator **Grassley**. Thank you, Jim.

Congressman Levitas.

STATEMENT OF REPRESENTATIVE ELLIOTT H. LEVITAS

Mr. **Levitas**. Thank you, Mr. Chairman. I again want to express my appreciation to you for your leadership in this area. Having worked with you over many years, it has been encouraging to me to have seen that persistence, diligence, and leadership in the Senate has made all the difference in the world and has, I think, brought us to the point where we are today and I believe to a success during this session of Congress.

Along with my colleague, the gentleman from North Carolina, I can assure you that the House of Representatives is going to continue to be marching in the forefront of the effort to ensure congressional review of executive action. If we can move along at a relatively early time, I am satisfied that we will see some action in the House this year.

I am going to be very brief, Mr. Chairman, because, first of all, I feel, at least with respect to the Senator from Iowa, I am preaching to the saved already; so I do not need to bring about any conversions there.

I am just going to simply say that I agree with everything Congressman Broyhill said. His sentiments are precisely what I would have said, and he is absolutely right on all points.

I want to just add two other points beyond the points that he made. First of all, he is correct; even if there had been no *Chadha* decision, we needed to do something in this area and also in the general area of regulatory reform. Regulatory reform legislation and comprehensive legislative veto was pending in Congress before the *Chadha* decision, but it is even more urgently needed today than it was then. My second point is one that I think a lot of people have lost sight of: The *Chadha* decision, the *FTC* decision, and the *FERC* decision have dealt only with those particular laws. The Supreme Court only addressed the issue of severability in those specific laws, and not in a general sense.

There are literally hundreds of other laws out there that have legislative veto provisions in them, and the whole question of severability is one that is going to have to be addressed. Hopefully, this will not be done on a case-by-case basis because you are going to see some very curious and contradictory results.

The most curious one I have seen so far was the decision, Senator Heflin, out of the U.S. District Court for the Southern District of Mississippi involving the EEOC. I think it was *Allstate Insurance Co.* v. *EEOC.*

The Reorganization Act lets the President propose changes in the structure of an agency, and if it is not vetoed by Congress, then it goes into effect. There is legislative veto in there. The court said if the *Chadha* case teaching is correct, then the legislative veto is unconstitutional.

And he found the veto to be unseverable in that case, saying that Congress had never given the President the right just to change agencies, repeal laws, and restructure government without having some say so in the process through the legislative veto.

And so the court found that the whole law falls, and therefore the EEOC, which was restructured under that grant of authority, did not have the particular power or authority in this particular instance. In direct contrast with this, in another case involving the Reorganization Act, another court found the legislative veto was severable, and that the remainder of the act stands on its own—*Muller Optical Co.* v. *Equal Employment Opportunity Commission,* November 10, 1983, U.S. District Court of Western Tennessee. Now, there are going to be a lot of cases like these, with many conflicting opinions, and I think Congress had better deal with this quickly, early on.

I have introduced a bill in the House called the "Super Sunset" bill. It is H.R. 4535. What I have done is identify about 90 laws where there is delegated authority with legislative veto attached. All of this authority would sunset 6 months after enactment to give Congress the time to come back and look at these statutes. We would decide whether we would have delegated such authority if we did not have a legislative veto, whether we would have modified our delegation of authority if we did not have a legislative veto, or restructure the legislative veto in some way, shape, or form as in the son of legislative veto mode. But we cannot just bury our heads in the sand and think we do not have to face this issue. We have to face this issue now.

Either we are going to let the agencies have the delegation without any constraint, in other words, keep what they have without the chain that was tied to it, or we have to go back and decide whether or not we really intended to make that type of delegation in the absence of legislative veto.

The *Chadha* case clearly threw out the baby with the bathwater, and notwithstanding the abysmal ignorance displayed by the court of the way our Government really has to function pragmatically, we have to deal with the situation as we find it today.

I suggest that we do need to have the two house approval mechanism, through a joint resolution, for major rules and the two house disapproval mechanism, also through a joint resolution for nonmajor rules with expedited procedures.

That would, in my judgment, be the most appropriate response to the *Chadha* decision, and it is one that we really do not have the luxury, Mr. Chairman, of putting off.

Thank you for the opportunity to appear today. I would like to ask to submit my full written testimony for the record, as well as my remarks during the Georgetown University symposium on legislative veto which was held on October 13, 1983.

[Material submitted for the record follows:]

PREPARED STATEMENT OF REPRESENTATIVE ELLIOTT H. LEVITAS

Mr. Chairman, and distinguished Members of the Subcommittee, I appreciate your inviting me to appear before you today to testify on what I believe is one of the most important issues facing the Congress, and indeed our entire government, today. I have testified many times on the subject of today's hearings, but never before have the concerns surrounding the issue of legislative veto been so critical as they are today in the wake of the Supreme Court's June 23, 1983, ruling that the legislative veto is "unconstitutional".

It is indeed staggering to consider the impact of this decision on government today. The Supreme Court's decision in INS v. Chadha,and in the two subsequent cases which were handed down, Consumers Energy Council of America v. the Federal Energy Regulatory Commission (FERC) and Consumers Union of America v. Federal Trade Commission, are truly landmark decisions which, until reversed, will fundamentally change the way in which our government operates. We have, in my opinion, experienced a train-wreck in government, and it is going to take some time to put the engine back on the tracks and get it moving again.

There is no point in dwelling on the merits or demerits of the majority opinion, for it is what we must work under at least for the time being. Some observations on the history of the legislative veto, however, do put the court's opinion in perspective.

The legislative veto came into use in this century as a mechanism to deal with the realities of modern government. Some historians trace the use of a legislative veto device back many years in English history. To those scholars, the legislative veto was such a common instrument of government that the founding fathers saw no need to write such a procedure explicitly into our Constitution.

In 1929, President Herbert Hoover recognized the purpose a legislative veto could serve in the U. S. government in the twentieth century. Facing the need to reorganize parts of the federal bureaucracy and the structure of the Executive Branch, and realizing that it would be better for the Executive Branch to devise reorganization plans than for Congress to do so, the Congress agreed to give President Hoover the authority to reorganize the Executive Branch with the stipulation that Congress could disapprove his reorganization plan through a legislative veto if they chose to do so. This delegation of authority to reorganize the government has continued to operate with the check of a legislative veto as a means for maintaining the balance of power. Even as recently as the Carter and Reagan Presidencies, Administrations have contended that this type of legislative veto is constitutional. (Compare to EEOC v. Allstate Insurance Co., discussed below.)

In other areas, the need arose for Congress to delegate authority to the Executive Branch in order that the government might cope realistically with the growing complexity of the society which it served. Control through the legislative veto mechanism has spread into numerous areas over the years -- war powers, budget impoundment and control, foreign arms sales, nuclear proliferation, export controls, immigration policy, and regulatory policy. As Congress increasingly delegated authority, the bureaucratic agencies -- both independent and those in the executive branch -- swelled in number and in the size of their personnel. These agencies were given the authority to write rules and regulations which govern our society with the same force and effect as the laws written by the elected Congress. In order to maintain its control over this authority, Congress, in some cases -- though not often enough, in my opinion, -- required that these rules and regulations be subject to Congressional review and if the Congress deemed appropriate, a legislative veto.

The system which evolved was simply a means by which the Congress could delegate to the President or to the executive branch or the independent agencies, the discretion to take certain actions, with the understanding that Congress, in the exercise of its plenary legislative power under Article I of the Constitution, would be able to look at that action; and if the Congress decided that the action was excessive, or arbitrary, or oppressive, or just plain stupid, then the Congress, the elected representatives of the people, could reject that action.

The legislative veto was not used as a means through which Congress could interfere in the legitimate business of the Executive Branch. It did not deal, at all, with enforcement or execution of the laws. Rather it was a means by which the Congress could maintain control over what was the legitimate responsibility of the Congress -- the responsibility for making the laws of this country. Granted, in some cases, Congress may have delegated too much authority to the agencies and to the Executive Branch, but in most cases some delegation was necessary. The purpose of the legislative veto was to assure that the final responsibility and accountability for the actions taken under the delegated authority rested with the elected representatives of the people.

Congress must answer every two years, or every six years, to the people for its decisions. If a Member of Congress, or a Senator, makes decisions which his or her constituents disagree with, the constituents can make their views known at the polls. But that is not the case with the unelected officials in the bureaucratic agencies. They are not elected, they do not suffer the inconvenience of having to run for office, and thus they do not have to answer to the people. It only makes sense that under our system of government, which is based on democratic principles, that those who are accountable to the people have the final say over these rules and regulations which have the force and effect of law. If the Congress finds that a rule or regulation is arbitrary, oppressive, or contrary to the intent of the law, then the Congress ought to have the right to stop that rule from going into effect. The legislative veto provided a means for doing that.

In his dissenting opinion, Justice Byron White says of the legislative veto:

> It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over law-making. . . the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker.

I believe that Justice White's dissent will eventually become law, for it reveals a clear understanding of the workings of government today, and the manner in which the legislative veto is framed by our Constitution as it operates today. Unfortunately, the Supreme Court, in its majority opinion, displayed an abysmal ignorance of the way in which our government has evolved today.

Nevertheless, we must move on, for the problem still remains. Congress must delegate, and the Congress must be able to control the authority which is delegated. There are more ways than one to skin a cat, and I am certain that the Congress will continue to move forward and reassert its authority over the Executive Branch and independent agencies. I would like to present to the Subcommittee the ideas that I, along with several of my colleagues, have been pursuing for the future course.

Certainly, one of the major questions to be answered is what becomes of the many laws on the books which contain legislative veto provisions. Legislative veto provisions have been included in over 200 laws, and it is unclear at this point whether or not the Supreme Court decision invalidates only the legislative veto provision, or whether or not the entire law becomes invalid under this decision. For in many cases, it is questionable as to whether or not Congress would have delegated authority to the Executive Branch without the string of a legislative veto attached. It is going to take time to determine which of these laws will stand without the legislative veto procedure.

The issue will most likely have to be resolved through careful analysis of the legislative history on each individual law, and possibly through litigation. The Court did not make it clear how they would rule in such cases in the future. In the Chadha decision, there was a severability clause, and the Court determined that the remainder of the law should stand. But in the FERC case, there was no severability clause, yet the Court still ruled that the rest of the challenged law stands.

Yet, the courts are now calling into question actions taken years ago under statutes now shadowed with constitutional questions emanating from the Chadha decision. The U.S. District Court for Southern Mississippi struck down the Reorganization Act of 1977 as unconstitutional, finding "no doubt that Congress intended the one-House veto provision to be an integral and inseparable part of the entire Act. . ." (Equal Employment Opportunity Commission v. Allstate Insurance Company, No J82-0186(B), slip op. at 4 (D. So. Miss. Aug. 19, 1983). If this decision were to hold, and I doubt that it will, the repercussions would topple significant government institutions. The ruling certainly points to the significance of the severability question.

In another case involving the Reorganization Act, a District Court rule in the opposite manner, saying that the legislative veto provision was severable and the remainder of the Act stands on its own (Muller Optical Co. v. Equal Employment Opportunity Commission, 11/10/83, USDC W.Tenn.). It is obviously unclear from these two contradictory rulings whether the delegated authority will stand without the legislative veto. The difficulties of answering the severability question have prompted the former counsel for the House of Representatives to recommend a wholesale repeal of delegations of authority affected by the Supreme Court decision.

I hope the Congress will move to repeal much of the authority it has delegated in many cases, and we should do so, for we cannot simply leave the authority unchecked. But I think it is also important that Congress address this issue head-on, and eliminate the uncertainty that will exist if we just wait for cases on the various provisions to wind their way through the courts. The clearest path is for Congress to legislate the answer to the severability question. I have introduced legislation, which would, 180 days after its enactment, repeal all authority delegated where the string of a legislative veto had been linked to that authority, unless during those 180 days, the Congress acted to reinstate the authority with or without an alternative, "son of legislative veto" mechanism. This "Super Sunset" legislation will erase the uncertainty which now exists and which will continue to exist until Congress deals with the issue of severability.

In the short term, while these laws are being examined and conclusions are being drawn as to their standing without the legislative veto provisions, Congress is going to have to keep the agencies on short leashes and under short rations of appropriations. Short time periods for authorization and appropriations for agencies and programs will allow Congress to review agency action on a more frequent, periodic basis and curtail action which is inappropriate through the funding and authorizing process.

There are other mechanisms which the Congress may devise which would have the same effect as the traditional legislative veto, but which would fit within the framework of the Supreme Court decision. Some of these measures have already begun to be accepted by the Congress as alternatives to the legislative veto.

For example when the House of Representatives considered the reauthorization of the Consumer Product Safety Commission (CPSC) on June 29, 1983, I offered an amendment, which was accepted by the House, requiring that CPSC rules which were previously subject to a legislative veto be affirmatively approved by the Congress before taking effect. The rules would have to be approved through the enactment of a joint resolution, passed by both Houses of Congress, and signed by the President. Obviously, if one House fails to pass the resolution of approval, we have in effect exercised a one-House legislative veto.

In an article which appeared in The New York Times, on July 5, 1983 Robert E. Litan, a Washington attorney, and William D. Nordhaus, a professor of economics at Yale University, both of whom are noted as experts on regulatory reform, explore a proposal similar to the one I have put forward. Litan and Nordhaus suggest that the President present to Congress periodically the major regulatory proposals which are pending, with an analysis of their costs and benefits. These regulatory proposals could then be put into effect if affirmatively approved through an act of Congress in an omnibus bill. This idea deserves serious consideration, and I would like to have their article made a part of the hearing record.

There are other procedures which must be considered as well. Another approach which deserves serious consideration is that embodied in legislation introduced by Senators Carl Levin and David Boren. This legislation proposes a "report and wait" mechanism, which requires that agency rules and regulations be submitted to the Congress for a certain number of days during which time the Congress could review the regulations and act to disapprove them through the enactment of a joint resolution. The procedures for expedited consideration of a resolution of disapproval, which are contained in this bill, would allow for discharging the resolution if the Committee which was considering it did not act within a specified period of time. I strongly support the expedited procedures provision, and I think it is most important in that it assures that the decision on whether or not to disapprove regulations is not made by a handful of committee members who may be sympathetic to the agency, but is made by the full Congress.

In considering the CPSC authorization bill in the House, Congressman Henry Waxman offered an amendment which was similar to the Levin-Boren approach except that it did not include the expedited procedures. Without expedited procedures, a committee chairman could prevent full consideration of the disapproval measure. The Waxman amendment was accepted on the CPSC legislation along with my amendment, so it will be up to the conference committee to decide which provision will become law. I am confident that the committee will accept my amendment as it offers a better means of assuring control over the unelected officials of the Consumer Product Safety Commission.

A combination of an approval mechanism, along the lines of that accepted by the House of Representatives on the CPSC authorization bill, and a disapproval mechanism, such as that offered by Senators Levin and Boren, offers an attractive alternative to the legislative veto. The major rules of all agenices could be subject to the approval process, and the non-major rules could be subject to the disapproval process. This combination would provide for true veto control by the Congress in requiring affirmative action on the most significant regulations issued by the agencies, that is, rules with an economic impact of over $100 million per year; but this procedure would not unnecessarily burden the Congress or delay rulemaking which is more routine and less significant. Congressman Trent Lott and others have recently introduced legislation which incorporates this concept, combining the use of the approval mechanism and the disapproval mechanism in such a fashion. I support this legislation and urge the Congress to look favorably upon it.

One concern expressed over the use of an approval mechanism is that it might cut off some avenues of judicial review of agency development of the rule. While this belief is purely speculative, the problem can be avoided by structuring the mechanism in such a way that it does not affect the validity of the rule. For example, an approval resolution could simply approve authority for the agency to implement the rule. In this case, it would be clear that enactment of the resolution does not constitute approval of the rule itself for the purpose of judicial review.

A Congressional Research Service analysis of this point concludes that "The mere statutory statement of approval of a rule or regulation, however, is ambiguous." Commenting on the approval mechanism included in the CPSC reauthorization bill, the report notes "Congress does not adopt the language of the regulation as its own when it passes the resolution. Under such circumstances, a court might be reluctant to hold that Congress intended, in effect, to implicitly repeal the rulemaking procedures governing the CPSC in the case of a particular regulation and cut off challenges to the regulation by aggrieved parties" (Richard Ehlke, "The Impact of Joint Resolution of Approval of Agency Rules on Judicial Review of Approved Rules", Congressional Research Service, September 22, 1983). This report suggests that if the Congress does not intend to cut off judicial review, it can make this intent clear to the courts through the legislative history and/or through specific language in the resolution.

Even if affirmative approval of major rules does have the effect of legislating the rules and subjecting them only to the judicial review accorded to a statute passed by Congress, who can really object? Who can object to the elected Congress legislating? It is far better than unelected officials legislating with very limited judicial review which is available only to those who can afford it. The opportunity for accessibility and input by the public is the best check on arbitrary action and that occurs in the legislative process. In the case of major rules, this is altogether proper, and again, in the wake of the Chadha decision seems to be the course advocated by the Supreme Court.

Yet another approach which could be used to accomplish the purpose of the legislative veto is available through changes in the internal rules of the House. I will not comment on Senate rules or procedures. The rules of the House could be changed to provide that whenever rules or regulations are disapproved by the House of Representatives, appropriations for the implementation of those rules would be deemed "out of order". This change in the rules would be accompanied by legislation requiring that proposed rules be sent to the Congress for a review period ("report and wait"). During this time, the appropriate committee of legislative jurisdiction could review the regulations, and if it decided to do so, report a disapproval resolution to the House. The House could adopt the disapproval resolution, and in doing so prevent funding for the implementation of the regulations.

This procedure would have no effect on the validity of the rule, but it would be controlling through the purse strings. The Supreme Court has ruled previously that it is up to Congress to determine what should be funded and what should not be funded. For example, in the case Harris v. McRae dealing with federal funding for abortions, the Supreme Court ruled that the refusal of the Congress to fund an activity "cannot be equated with the imposition of a 'penalty' on that activity" (Harris v. McRae, 448 U. S., October Term, 1979).

These are some of the ideas which are being considered as alternatives to the legislative veto. Having had several months now to reflect on the impact of the Chadha decision, and having worked with a number of my colleagues to develop these responses to the decision, I believe it is now time for the Congress to consider seriously the enactment of alternative legislative review provisions.

While I think it is preferable to consider this matter in an omnibus fashion, if we are going to do so, I think it is necessary to move expeditiously with enactment of legislation such as the "Super Sunset" legislation I have proposed which will force the Congress to deal with the laws now containing legislative veto provisions. And I would urge this Subcommittee to do what it can to move toward expeditious consideration of omnibus congressional review provisions such as that contained in the Lott bill.

I am greatly concerned about the the confusion and uncertainty which has resulted from the Supreme Court decision, and shortly after the decision was handed down, I wrote to President Reagan and proposed that he, and the leaders of the Congress, call for the convening of a National Conference on Power Sharing to address these concerns in a comprehensive fashion. A National Conference on Power Sharing could have helped to avoid the disruption, and the confrontation between the branches of government, which we are now facing.

The Conference I proposed would have brought together high Administration officials, leaders in Congress, representatives of the academic community, and the "think tanks" such as the Brookings Institution, and the American Enterprise Institute, as well as representatives of the business community, organized labor and public interest groups. Through this Conference a dialogue could have been established from which solutions to the problems could have been devised in a more structured context. This was not to be another "commission" to look at a problem, but simply a conference to discuss the impact of the Chadha and what we should do to cope with it.

My letter to the President was dated July 19, 1983. I was informed through a letter from Kenneth Duberstein, Assistant to the President for Legislative Affairs, dated August 1, 1983, that my proposal was being carefully reviewed by the White House Counsel. On September 15, 1983, I wrote to the White House Counsel, Mr. Fred Fielding, to inquire about their review of my proposal. I was wondering why I had received no answer. I received a response back from Mr. Fielding saying that I would soon be hearing from the

Deputy Attorney General on this matter. The next day, September 20, 1983, I received a letter from Deputy Attorney General Edward Schmults. Mr. Schmults informed in his letter that the Administration did not think we needed to have a National Conference on Power Sharing. They seemed to think the problems would take care of themselves.

It is interesting to note the main reason for the Administration rejecting my proposal. According to Mr. Schmults' letter, they did not think it was wise to set up another "commission" as these kind of new government entities tend to take on a life of their own. Although I never suggested we set up a commission, I found that excuse interesting in that came from the same Administration which has set up a commission to study social security reform, the MX missile, hunger in America, U.S. policy in Central America, etc. The week I received this letter was the week the Attorney General announced the formation of a commission on domestic violence. I wrote Mr. Schmults to point out this inconsistency but have never heard back from him on the matter. I would like to make the correspondence between myself and the Administration on this matter a part of the hearing record. I believe it is unfortunate that the Administration did not move forward on this proposal, but since they did not, I believe it is even more important that we in the Congress move forward in dealing with the concerns emanating from the Chadha decision.

While I do favor approaching the issues raised by the Chadha decision in an comprehensive fashion, at the same time, I do not think we can let authorizing legislation which involves the issue of legislative veto languish. I would urge this Subcommitteeand the authorizing Committees, to move bills, such as the authorization bill for the Federal Trade Commission, to the floor at the earliest possible date. And, I would urge that these bills be brought to the floor under a rule which would allow for consideration of not one, but several, of the alternative approaches which have been proposed. It is time to allow the Congress to consider and work its will on both legislation providing for comprehensive legislative review proposals and on legislation for particular agencies such as the Federal Trade Commission.

I want to commend Chairman Grassley for conv ening hearings on the important issues facing us in the aftermath of the Chadha decision, and I look forward to working closely with this Subcommittee as we move to resolve these problems. It is very important that we act responsibly, yet swiftly, for we must move to reassert the control of Congress, the elected representatives of the people, over the the unelected officials in the executive branch and the independent agencies. Their actions have the force and effect of law, and in the end, the Congress stands accountable for those laws.

THE NEW YORK TIMES, TUESDAY, JULY 5, 1983

With the Veto Gone

By Robert E. Litan and William D. Nordhaus

WASHINGTON — The United States Supreme Court's decision striking down the legislative veto corrects a longstanding defect in the Federal legislative process.

Since the veto device was introduced in the 1930's, Congress has grown progressively sloppy in writing laws. Instead of the careful crafting envisioned by the Founding Fathers, Congress often gave a blank check to the executive or to an independent agency. But it sometimes reserved the right to put a "stop" order on these checks, by the now-unconstitutional veto, should it later (spurred by a special-interest group) change its mind.

Nowhere is the excessive delegation of legislative functions more extreme than in economic and social regulation.

Even though regulation is as important a part of the legislative process as, say, raising and spending revenues, many regulatory statutes are egregiously vague, simply directing an agency to regulate in the "public interest." Natural-gas prices became regulated under a general "public interest" standard, not because Congress decided it was sound energy policy. Cities are required to make subways and buses accessible to handicapped people even though Congress never envisioned this outcome.

In other cases, statutes are specific but place no limits on the amounts that regulators can require firms to spend. Businesses spent $32 billion in 1981 controlling air and water pollution because Congress delegated to the Environmental Protection Agency a legislative function of taxing and spending on pollution control. Nuclear power is dying under the weight of safety regulations. Regulating everything from teddy bears to 747's, our fourth branch of Government legislates more pervasively, and more autocratically, than King George III.

In the last few years, many in Congress have become concerned about this over-delegation. Legislative vetoes are now in place (but in peril) for a few regulatory statutes — in seat-belt regulation, in Federal Trade Commission rules and in some natural-gas rules.

In recent reform proposals, moreover, many members of Congress hoped to reverse the problem of excessive Congressional delegation by an omnibus legislative veto provision for all major Federal regulation. This route is now clearly closed.

In the wake of the decision nullifying the legislative veto, the nation should pause to consider fundamental issues of who should legislate, and how.

Some think that Congress will now have to write highly detailed statutes; others think that, like an overburdened mule, Congress will simply balk and bring the legislative process to a halt.

In the regulatory arena, some worry that the first alternative will lead to overly politicized regulatory decisions traditionally left to agency "experts." Others, noting that good legislation requires time and effort, fear that Congressmen will devote neither and instead retreat to a haven of noncontroversial inactivity.

There is a middle way. The central problem for Congress, with no legislative veto as a crutch to lean on, is to structure its consideration of the issues, such as regulatory policy, in such a way that precious Congressional time is devoted to major questions, while execution and implementation are delegated to administrative agencies.

We believe that there is a mechanism through which Congress can structure its regulatory decision-making in a fashion that meets both these objectives.

Specifically, we suggest adoption of a "legislated regulatory calendar" under which the President would present to Congress each year all of the 50 or so major Federal regulatory proposals. Each proposal would be accompanied by an analysis of costs and benefits. An act of Congress would then be required before agencies could put their rules in final form. The calendar proposal resembles the Congressional budget process, which has, since 1974, allowed Congress to direct the broad pattern of its spending. Such a process could serve well as a model for regulation.

A regulatory calendar would remove legal uncertainties about rules (such as the automobile air-bag rule, still unresolved 13 years after it was first proposed). It would permit Congress and the executive to set regulatory priorities — a task nowhere performed today.

But most important, it would provide a constitutionally sound mechanism by which central issues, such as the quality of our air and water or the safety of our highways, could be directly decided not by unelected regulators but by elected representatives.

Congreſs of the United States
House of Repreſentatives
Washington, D.C. 20515

July 19, 1983

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The Supreme Court's decision relating to the legislative veto has created a situation of uncertainty and the potential for disruption and serious confrontation within our government. I would hope that the Executive and Legislative Branches can address this new circumstance in a constructive and cooperative way so that the manner of power sharing and accountability within the federal government can be resolved in a meaningful and harmonious context.

I will not address the merits or demerits of the Court's decision nor relate the historical and pragmatic and evolutionary constitutional development of the legislative veto concept. You are well aware of the rationale and importance of the legislative veto, having editorially supported it as a commentator and a columnist, having specifically endorsed it as a candidate for President (Youngstown, Ohio, October 8, 1980) and having embraced it as part of the 1980 Republican Party Platform. Therefore, I will address myself to the vital question of where we go from here.

Obviously, Congress can devise a host of mechanisms within the scope of the Court's decision that will reassert the Congressional authority over decisions of the President, executive agencies, and independent agencies. These mechanisms could range from stripping away all, or most, of the delegated discretionary powers to the use of appropriation restrictions to the structuring of procedural devices to requiring affirmative Congressional approval for all major actions or regulations to proposing a Constitutional Amendment -- to name a few. Indeed, both the House and Senate have already taken actions in the Court decision's aftermath to do some of these things.

Some of the potential Congressional responses to the Court's decision are more intrusive, restrictive, and unwieldy than others, but all manner of means will be utilized to reassert an accountability to the Congress over actions previously covered by the legislative veto.

So long as this uncertainty exists I foresee the potential for years of wasteful and bitter confrontation and even chaos in our government. It is for this reason that, as one first step, I urge the early convening of a Conference on Power Sharing to address this new situation and consider solutions. I truly believe we are at a new crossroads in the course of our governmental development, and I believe we need to deal with it as responsibly and objectively as possible, not just for the present but for the future as well.

The Conference I propose would involve assembling representatives of the Executive Branch, leaders in the Congress, people from the academic community, representatives from "think tanks" (e.g. American Enterprise Institute, the Brookings Institution, etc.), organized labor, the business community, public interest groups and the like. This Conference would not be a Commission expected to propose by consensus or vote specific solutions, but rather would be a means for laying out the problem, defining it, and exploring directions that could lead to solutions in a free and open and thorough dialogue. I believe this Conference could meet for a relatively short period in early Fall and provide a focus for the cooperative consideration of this matter. It would take the joint efforts of yourself and the Congress to call and provide for such a Conference, but I think the benefits would be enormous and the failure to take such action will leave the consideration of this issue to years of disruptive, haphazard and confrontational resolution.

The Conference could result in some short term or long term specific proposals, or it could lead to a subsequent more formally structured Commission but surely it would go a long way to defining the dimensions of this problem and outlining areas of concern that need to be addressed. It would provide a forum for providing a common data base and avoid having all of the different points of view speaking to each other from a distance in press releases and legislative or administrative actions. It would surely lead to a better and clearer understanding of both differences and common ground.

I hope you will favorably consider this proposal so that you and the leadership in Congress can proceed without delay in its implementation to provide for the convening, preparation, background work, and staffing of the Conference.

With best wishes, I am

Very truly yours,

ELLIOTT H. LEVITAS
Member of Congress

THE WHITE HOUSE
WASHINGTON

August 1, 1983

AUG 3 1983

Dear Elliott:

On behalf of the President, I would like to thank you for your letter proposing a Conference on Power Sharing in response to the recent Supreme Court decision relating to the legislative veto.

The President appreciates your thoughtful comments on this important issue. Rest assured that your proposal is now being shared with White House Counsel for careful study and consideration.

With best wishes,

Sincerely,

Ken D.

Kenneth M. Duberstein
Assistant to the President

The Honorable Elliott H. Levitas
House of Representatives
Washington, D.C. 20515

Congress of the United States
House of Representatives
Washington, D.C. 20515

September 15, 1983

The Honorable Fred Fielding
Counsel to the President
The White House
Washington, D. C. 20500

Dear Fred:

What is taking so long in responding to my letter to the President about the National Conference on Power Sharing? I need to have an answer one way or the other within the next ten days.

I will appreciate your attention to this matter.

Thanks

Very truly yours,

Elliott H. Levitas
Member of Congress

THE WHITE HOUSE
WASHINGTON

SEP 21 1983

September 19, 1983

Dear Elliott:

Thank you for your note of September 15, inquiring into the status of the Administration's response to your proposal that a "Conference on Power Sharing" be convened to consider the effects of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*. It is my understanding that you will soon be receiving a reply over the signature of the Deputy Attorney General. I am sorry if the delay has caused any inconvenience.

Sincerely,

Fred F. Fielding
Counsel to the President

P.S. - It was good to see you recently; sorry for the delay -

The Honorable
Elliott H. Levitas
United States House of
Representatives
Washington, D.C. 20515

U.S. Department of Justice
Office of the Deputy Attorney General

SEP 20 1983

The Deputy Attorney General
Washington, D.C. 20530

September 20, 1983

Honorable Elliott H. Levitas
Congress of the United States
House of Representatives
2416 Rayburn House Office Building
Washington, D.C. 20515

Dear Elliott:

The President has asked me to respond to your letter of July 19, 1983 regarding the aftermath of the Supreme Court's legislative veto decisions.

We enthusiastically share your view that the Legislative and Executive Branches should address the issues created by the legislative veto decisions in a constructive and cooperative way. We applaud your initiative in this approach. The Administration looks forward to productive deliberations with you and other interested Members of Congress on this subject.

As you know, the Administration provided testimony concerning the Supreme Court's legislative veto decisions on July 18, 1983. At that time, I was a witness before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary of the House of Representatives. The positions which the Administration expressed to Congress through my testimony included our analysis of the Supreme Court decisions and our observations regarding potential future actions to enhance the accountability of government decisionmaking, particularly by "independent" agencies. I provided, along with my testimony, a comprehensive inventory of all of the statutes which we had identified which contained legislative veto provisions. I am enclosing herewith a copy of my testimony and our inventory.

We have some reservations, at least at this time, regarding the need for a formal conference or commission to discuss legislative vetoes or the appropriate Executive or Legislative Branch response to the Supreme Court decisions. Since there are so many forms of vetoes connected with so many different substantive laws which are designed to operate in such diverse ways, we are concerned with treating the situation in a manner which may assume that one "solution" or "response" is desirable or even possible. I believe it will be useful to hear from various scholars and commentators in the form of articles and speeches and to otherwise listen to the marketplace of ideas before formalizing any commission or conference structure. A premature and structured forum for attempts to resolve these questions may simply lead to solutions for the sake of solutions before all of the alternatives are analyzed.

Perhaps we should consider the extent to which the Administrative Conference of the United States might be an appropriate forum for the discussion of matters such as this. As you know, that is a permanent agency established by Congress for the purpose of providing a medium through which federal agencies, assisted by outside experts, can cooperatively study mutual problems, exchange information and develop recommendations on matters of administrative law. The Conference membership includes, in addition to its governmental membership, thirty-six private lawyers, university faculty members and others specially informed in law and government. Of course, Members of Congress would participate fully, as experts or otherwise, in any consideration by the Conference of issues raised by the legislative veto decisions.

I believe we should be reluctant to support the creation of new entities for the examination of problems which can be as easily considered by existing institutions. Ad hoc committees and commissions, once created, seem to develop perpetual life. Institutions created by the Constitution and staffed by the dedicated people placed in them by the electorate and the President's appointees presumptively ought to be capable of addressing these difficult issues. I would hope that this might be an instance in which we could respond to this important subject without creating another government entity.

Please let me know if you wish to discuss this in greater detail.

With best regards,

Edward C. Schmults
Deputy Attorney General

Enclosures

cc: Honorable Thomas P. O'Neill, Jr.
The Speaker

Honorable Howard Baker
Senate Majority Leader

Congress of the United States
House of Representatives
Washington, D.C. 20515

September 21, 1983

The Honorable Edward C. Schmults
Deputy Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Ed:

I have your letter of September 20, responding to my letter to the President of July 19 proposing a National Conference on Power Sharing.

Since the Administration has rejected the proposal I made,it appears that we are destined for an era of confrontation as well as uncertainty and confusion. But so be it. The choice was the Administration's to make, but I find it hard to believe this was President Reagan's personal decision.

I suppose the War Powers Act and some of the authorization bills now moving through Congress are as good a place to begin as any. Let's have at it.

The suggestion that the Administrative Conference of the United States would be an appropriate forum to discuss matters such as this is hardly one that should be taken seriously. The type of policy considerations and expertise needed to deal with this milestone in constitutional evolution does not exist in the Administrative Conference of the United States. It has neither the status nor purpose nor credibility to address the full scope and range of this issue.

To suggest that the Conference (not a Commission) I had suggested was the creation of a new "entity" or that such a meeting and forum could take on perpetual life is totally absurd. In fact I find that laughable coming from an Administration that has established commissions for everything under the sun, including Social Security reform, Central American policy, strategic weapons and arms control, educational policy, the handicapped, hunger, just to name a few. In fact, didn't the Attorney General himself just this week announce a new commission on domestic violence? Surely, Ed, you were embarrassed writing your letter to me and giving that reason. How about telling me what the real reason is.

I am also somewhat surprised that the response to my letter came from the Justice Department rather than the White House. The matter which I addressed to the President is of such pervasive Executive Branch-Legislative Branch policy nature that to consign the matter to the Justice Department rather than dealing with it directly in the White House is perhaps indicative of the failure of the Administration to appreciate the scope and extent of the confrontation that now -- unnecessarily, but inevitably -- lies before us.

Very truly yours,

ELLIOTT H. LEVITAS
Member of Congress

REMARKS OF HON. ELLIOTT H. LEVITAS AT THE GEORGETOWN UNIVERSITY SYMPOSIUM ON LEGISLATIVE VETO--OCTOBER 13, 1983

Leaving aside a few differences that I might have with the Supreme Court decision, I think the nicest thing I said after the decision came out is that they displayed an abysmal ignorance of the government. It went down from there. But I am not going to talk about the decision of the Supreme Court, I think it speaks for itself. It was a decision -- a first impression depending on the biases, abilities or information of the Court -- it could have gone either way as far as I am concerned. And for that reason I think it does very little good at this time to argue whether it was a good decision or a bad decision. It was the decision and, at least for the time being, is what we all have to deal with. Therefore, I wanted to talk about what happens in the aftermath of Chadha. I would agree completely with the speaker that the stories and rumors of the death of legislative veto are very premature. And in fact, I think the aftermath of Chadha will see a response that will make the former legislative veto look like a pussy cat in terms of the relationship between the legislative and executive branches of government. We are already beginning to see that happen.

Now as a former attorney, and as someone who taught law school for a while, forgive me if I say that perhaps the most inappropriate place to discuss this issue is in a law school. And perhaps the most inappropriate forum for the issue to be resolved is in a court. There is no more fundamental power issue at stake than that between the executive and legislative branches of government. That is what our founding fathers were dealing with in the Constitution, and what we see presented in the legislative veto case. That is not to say that these decisions will not find their way to court because obviously as Chadha points out, there were half a dozen other cases before Chadha that pointed this out as well. But that does not really answer the question because we are not dealing with legalisms, we are dealing with resolving the sharing of power. This power is the ultimate power within a system of government, which by its very nature as well as its constitution, requires checks and balances. And the formalistic, I would say simplistic, reasoning of the Supreme Court does not address or deal with that issue. And that is why you will see the son of legislative veto very well and hardy, and perhaps much more vigorous than its parent.

It was interesting to me during the last 10 years as we debated this issue in Congress to find that many people took a position on legislative veto, not on whether it was a good idea or bad idea, but on how they felt about the issuing agency involved. And many of my colleagues who I think would describe themselves as liberals, felt that legislative veto was a bad thing when it applied to regulatory agencies. They thought that there was something really good about having these extremely bright people in the regulatory agencies who can make much better decisions than those of us elected by the people in America. The agencies knew more about the subject matter; they were better able to resolve the issues and instead of getting it messed up with the mud of politics, we could have pure, sensible and wise decisions coming down from these people who never suffered the inconvenience for running for public office. You can make a good argument for that provided you do not really believe in the system of government. And I was most surprised to find that some of the strongest opponents of legislative veto would be people who in another context would talk about how the public ought to be served. Yet when it came down to who was going to make the laws in this country -- and by that I mean the 10 to 1 ratio of regulations to laws passed by Congress the way we learned in our government classes in high school -- they opted for those people who nobody ever heard of in America, and if they did, they never had any chance to do anything about it. But they thought that was more democratic somehow than relying on the people in Congress for whatever reason. And then I remember the night after the Chadha decision, I was on a television program with a very dear and good friend of mine, Congressman Barney Frank. Congressman Frank had been pretty much of an opponent of the legislative veto. I noted that we were about to go on a recess, and I said, do you realize with a demise of legislative veto that by the time you come back from recess President Reagan could have deployed 4,000 Marines in Central America, he could have sold two nuclear power plants to Pakistan or Argentina, and sold a fleet of F-16's to Jordan without Congress having any say so in the matter. Did you know that the legislative veto applied in those areas as well? And it was interesting that Congressman Frank suggested immediately that we should repeal all of the authority given to the executive and agencies until we had a chance to sort out what was good and what was bad. I simply mention this to say that is precisely what we are going to be doing. And I would say that the proposal that you put forth is not as academic as some might think. In fact we have already devised that particular system with a few variations to comply with the Chadha decision. What we will end up doing is in effect stripping the regulatory agencies and the President himself, indeed, in many areas of the decisions that were previously subject to legislative veto. The question is would Congress have delegated the power to the President under the War Powers Act to deploy troops, would the Congress have given the Department of Transportation the authority to deregulate the airlines, or the Department of Labor the power to decide the labor protection compensation provisions? Would Congress have given the Consumer Product Safety Commission the powers it has to set standards for compliance which have the force of law without legislative veto. And so you are going to see, as we already have seen in the Consumer Product Safety Commission, and will be seeing soon in the Federal Trade Commission in the case of War Powers and nuclear nonproliferation and a whole variety of issues, that Congress would not have delegated such authority without an oversight mechanism.

I will be introducing before Congress adjourns for Christmas a bill which, I guess for lack of a better name, I call the "Super Sunset Bill." The Super Sunset Bill will identify each one of the laws which the Justice Department had identified as containing legislative veto. And it will repeal all of those delegated authorities 180 days after enactment to allow Congress to make a judgment as to what power should be delegated, and what powers should not be delegated, and what modifications should be imposed. In the meantime, as these bills come through Congress (whether it is the Environmental Protection Agency, Hazardous Waste Laws, the Federal Trade Commission Reauthorization, or whether it is Nuclear Non-Proliferation), you will see one of a variety of methods of veto debated and possibly attached to the legislation. What is at stake here is a decision of who should make the laws in this country -- the people you elect or those you do not. Where does ultimate accountability lie? And I think that in the last analysis it will lie with the Congress. The courts are not out of the woods yet. The question of severability, of course, still has to be dealt with on a case-by-case basis. In the three cases reputedly decided by the Supreme Court, the question of severability was not dealt with as precisely as I think it should have been.

A district court has just decided a case that is very interesting -- involving the Reorganization Act. The Reorganization Act provided that government reorganization could be accomplished by the President submitting a reorganization plan to Congress. If it was not vetoed by either House of Congress, the restructuring of an agency which involved the repeal of statutes or the writing of new statutes would all be done without any attention at all paid to the presentation clause. It just happens. Well the Equal Employment Opportunity Commission was reorganized under a 1977 Reorganization Act. The court in that case not only held the reorganization to be unconstitutional because of the legislative veto, but held the legislative veto to be unseverable. And the entire statute was struck down with the EEOC. Now that reasoning will apply to every reorganization that has occurred under the legislative veto. Obviously the courts are not going to let that stand. I simply raise that as something to keep our distinguished judicial out of the rain and out of trouble -- something to deal with over the next few months.

Senator **Grassley**. Well, thanks to both of you; I appreciate your activity in this area over a long period of time.

You three represent, including Trent Lott who is not here, the force behind the movement to require congressional approval of major rules in the House of Representatives

I would like to ask each of you to comment specifically on why approval is more preferable than disapproval and also, second, can you comment on the prospects for acceptance of this idea in the House. I know you have had a couple of votes on it.

Mr. **Broyhill**. Let me just reiterate what I previously said. We all understand, of course, that we are talking about the approval process as it applies to major rules. Major rules are those that have substantial impact on the economy.

It seems to me that Congress has a responsibility to take a close look at these kinds of regulations. Since there has been a delegation of the lawmaking powers to unelected bureaucrats, we have a responsibility as the legislative branch to be taking more than just a curious look at what these agencies are doing.

We should be taking an active role in participating in those decisions. This process is not going to slow down the work of Congress. We are talking about, perhaps, less than 50 rules per year. This is not an unworkable burden. It seems to me that any time these kinds of regulations have this type of effect, Congress should carry out its constitutional, legislative responsibility to pass legislation to approve that kind of regulatory action

Mr. **Levitas**. I would add this also, Mr. Chairman. If the teaching of *Chadha* is anything valid, it may have suggested to us that we have really delegated too much authority to regulatory agencies where the end product is legislative in nature.

We are the legislative branch, and where there are policy decisions being made that might be defined as major rules that have the same effect as a statute, that have more impact than many laws that we pass, perhaps Congress ought to affirmatively participate in that process.

So I think that when we are talking about major rules, the two house joint resolution approval mechanism is very essential. The reason it is preferable in this instance to the joint resolution of disapproval is also a very pragmatic one. The joint resolution of disapproval still gives the President the opportunity to veto the joint resolution of disapproval.

And presumably if the regulation in question comes from one of his own agencies in the executive branch, there is not much likelihood that he would disagree with the secretary or the administrator. The two-house approval mechanism leaves Congress with the responsibility of affirmatively enacting it, and if Congress fails to do so, it does not even get to the President.

Now, Senator Heflin and Senator Levin were discussing this point and asking if that does not really make it into a one-house veto.

Well, I suggest to you, Mr. Chairman, that every time Congress legislates or fails to pass a bill, it is exercising a one-house veto. Appropriations bills have to pass through both Houses of the Congress. If one House does not pass it, it is not an appropriations bill. And the same would be true of any other law.

Now, in the case of the regulatory product, the same would be the case. *Chadha*, which took a very strict, purist interpretation of the Constitution, says that when you are engaged in lawmaking, and rulemaking is lawmaking, you have to go through both Houses of Congress and get the President to sign it. That is precisely what the two house approval mechanism would do.

And indeed when we began to offer these amendments after the *Chadha* decision, we were advised by the Justice Department that they considered the two-house joint resolution approval mechanism to be constitutional and not to violate the ruling in the *Chadha* decision.

Now, will it pass in the House? I do not have a crystal ball. You know we have added it to one bill, the Consumer Product Safety Commission. Then on the Resource Conservation and Recovery Act [RCRA] legislation a funny thing happened on the way to final passage. To be frank, it was not, from our point of view, the most happy circumstance to raise the issue.

RCRA is a very popular piece of legislation; dealing with hazardous waste, a subject with which I have had some dealings over the last year or so. It is a very sensitive issue. Anything that looks like it is proenvironmental also has a great deal going for it. The bill was called up on this occasion, frankly without any time for us to make the type of "Dear Colleague" circulation and education or have contacts made in support of the amendment.

Nevertheless, we offered the amendment on the floor and it passed over the opposition, the strenuous opposition of the leadership and others on the floor of the House. After the bill passed, under our procedures, the leadership asked for a second vote and on the second vote the amendment lost by a few votes. Actually, I thought we did much better than I had any expectation of doing.

In the process of failing on the second vote, I noticed that there were several Members who had to immediately go to the doctors to have their arms adjusted. There had been a little bit of twisting going on. And so I really cannot predict what is going to happen next time.

I will tell you that by the next time the Members who strayed from the fold on this last occasion will have been contacted in the meantime. And my guess is that the outcome of the elections in November will strengthen our hand in that regard because I think the American people recognize that when a rule or regulation has a major impact on their lives or on their pocketbook, the people they elect ought to be passing on it and not passing the buck.

Senator GRASSLEY. Thank you. Before I call on Senator Specter, one last question, and it is one that I brought up with Senator Levin. I would like to have your comment on the importance of judicial review of agency compliance with a congressional review mechanism and on the importance of maintaining an avenue of judicial review for the underlying rule itself.

Mr. BROYHILL. Well, I commented on that in my opening remarks, and I think that your language in section 808 is good. It says that the enactment of an appropriate resolution approving a major rule shall not be construed to create any presumption of validity with respect to such rule, and shall not affect the judicial review of the rule under chapter 7 of the APA. I believe that the memorandum that I submitted does cover this point and confirms this analysis.

Mr. LEVITAS. I would agree; the memorandum that Mr. Broyhill referred to, I think, substantiates the view that I take of the language that you have in your bill and also one of the mechanisms we used in the Consumer Product Safety Commission amendment. This was not to deal with the substance of the rule, but to deal with the enforcement of the rule.

And what we did was to withhold any funds for appropriations to implement the rule, which would clearly leave all judicial review avenues open with respect to the rule itself, even if there was a nonadministrative enforcement possibility associated with it.

Let me conclude; I agree totally with what Congressman Broyhill has said, and that is my belief that your amendment leaves open avenues of judicial review and that is a good thing. But let me make another point about it, Mr. Chairman, because I think we ought to be very up front about it. If the Congress, by passage of a resolution through both Houses and signed by the President, says that this is what we want to do and that is the equivalent of legislating, then the courts can always review this action as they can with any congressional action. Nobody can complain that there is not some judicial review of what Congress has legislated.

Now, not every act of Congress is perfect, and there is judicial review of acts of Congress today. To that extent you would still have judicial review. But, remember, we are talking about passing a resolution through both Houses of Congress and having it signed by the President. And that is the way you legislate.

Mr. BROYHILL. Again, I remind you, that the Congress is not enacting the actual text of the regulation itself into law. All the Congress is doing is passing a resolution of approval. It is not enacting the text of the rule itself.

Senator GRASSLEY. Thank you. I would now like to welcome Senator Specter who is a member of the subcommittee, a valued member of the subcommittee and someone who I have had an opportunity of working closely with and becoming better acquainted with in the last 3 years. We are glad to have you Senator.

I would like to add that you are a cosponsor of the legislation we are having this hearing on as well.

Senator SPECTER. Thank you, Mr. Chairman. I commend the Chair for the leadership which you have shown in this important area. I also commend Congressman Levitas and Congressman Broyhill for their leadership on this very important subject.

I have one question, which perhaps may shed some light on congressional rules of agency review which is a matter of current concern on the impact of the legislative veto issue on the assault cases, sexual assault cases, which has been apparent for the last few days with a number of us being concerned about the enforceability of the Criminal Code in the District of Columbia on sexual assault cases.

One District of Columbia judge yesterday, Judge Smith, was reported to have said that the law in its present form was unenforceable. A number of us were talking about that yesterday concerning whether there is some action which ought to be taken by the Congress on that subject. I am especially concerned as the chairman of the District of Columbia Subcommittee of Appropriations and also the Criminal Law Subcommittee.

What is the impact there? Congressman Levitas, I see you nodding, perhaps you are knowledgeable on the subject.

Mr. LEVITAS. I would take the Supreme Court's decision on *Chadha* at face value. I think that as a result the District of Columbia Criminal Code, the District of Columbia actions, to the extent there are legislative vetoes that are applicable to them, are invalid.

Before you arrived, Senator, I made reference to the case in the Southern District of Mississippi, *Allstate Insurance Company* v. *EEOC*, where the court applied *Chadha* to the executive branch reorganization authority legislation, and said that the veto provision contained therein was unconstitutional, that it was inseparable, and therefore the act could not stand on its own.

Senator SPECTER. Inseparable or insufferable?

Mr. LEVITAS. Both. I am sure it was both. That is why I think it is terribly important that Congress address every single piece of present law where you have a delegation of authority accompanied by a legislative veto and make a judgment as to whether or not we would have delegated without the veto or modify that delegation or put a new mechanism in.

We had better do it very, very quickly or else you are going to find, Senator, the type of situation you have in the District of Columbia. And, you know, you cannot have it both ways. The Supreme Court cannot say, well, it was not good for *Chadha* and it was not good for *FERC*, but it is OK for this other situation.

Senator SPECTER. Why cannot the Supreme Court say that?

Mr. LEVITAS. Well, obviously, the Supreme Court in light of what they said in *Chadha* can say anything it wants to say, even if it is not good law. But it would be very inconsistent and at best leave a cloud of uncertainty hanging over a whole series of laws. I mentioned earlier that I have introduced a supersunset bill, which repeals 6 months after enactment all authority accompanied by legislative veto in order to give Congress an opportunity to decide which of these we would change, which we would reenact without a legislative veto or which we would put a new veto mechanism in.

According to the list I have here in front of me at the time I introduced it, that includes 89 different statutes. And I think we had better deal with these or else you are going to have *FERC* treated differently than government reorganization; you are going to have nuclear nonproliferation treated differently than the export of nuclear materials and differently than commercial fishing 200-mile limit, which has a legislation certain provision. You have all these laws out there. And I think they are all under this cloud.

Senator SPECTER. So, Congressman Levitas, you are suggesting that the entire District of Columbia Code is inoperative at the present time.

Mr. LEVITAS. Yes, until the Congress comes back, makes a judgment, and brings that legislation into compliance with the *Chadha* ruling some way or the other, or decides we do not want a veto attached.

Senator SPECTER. Well, the District of Columbia Code—that would include the District of Columbia Criminal Code and that would not be just the assault cases; that would be all the cases, including the homicide cases, robbery cases.

Mr. LEVITAS. I think, you know, Senator, the day of the *Chadha* decision I was asked by a reporter, what does this mean. What is the implication of this. And I said, if the *Chadha* case is applied literally, it means we have a train wreck in Government and we had better get it back on the track.

If the *Chadha* case means what it says, the District of Columbia Code and the Criminal Code is invalid. And we had better do something about it very quickly.

Senator SPECTER. Congressman Levitas, I do not disagree with your admonition that as a matter of precaution we ought to do something about it immediately. I do not agree with the conclusion that the codes are all invalid. I think it would be important that some of us say that because if it were true that these laws were all invalid, then any crime committed in the District of Columbia today would go unpunished. Not only would the sexual assault cases not be subject to criminal prosecution, but all the cases and all the people in jails. It is my sense that notwithstanding one interpretation or one implication of *Chadha*, that the Supreme Court of the United States would not go that far.

I think we ought to act and we ought not to test their wisdom to that extent.

Mr. LEVITAS. Mr. Chairman, may I just suggest one thing to Senator Specter. I am not at all happy with that interpretation, but I do not see how that decision can be made, given *Chadha*. Even if it is made, every case that is tried under the District of Columbia Code is going to be subject to challenge until the Supreme Court does speak.

Let me give you another case. Do you remember the *Nixon* papers case? The *Nixon* papers case was under the Watergate legislation, saying that GSA would make the papers available to the public under certain regulations issued by GSA. There was a legislative veto in that law, and in fact the legislative veto was exercised, if I remember correctly, on three separate occasions before regulations were issued that actually passed muster.

Nixon litigated this and lost. The regulations were held to be valid and an order was issued making these papers available to the public.

After the *Chadha* case Nixon's attorneys and the others involved came back, petitioned the court to reconsider its order in light of *Chadha*, and the court said the legislative veto in the GSA legislation so tainted it that the question of nonseverability applied and the order was rescinded.

So, I mean, there is not a clear-cut answer on this.

Senator SPECTER. Is that the DC Court of Appeals?

Mr. LEVITAS. I do not know if it was the court of appeals or the district court where the order actually emanated from, but I can certainly get you the citation on that.

Senator SPECTER. What is the best argument on the other side? You are certainly one of the leading experts on this subject. How would you articulate the best argument on the other side, that the District of Columbia Code is not invalid?

Mr. **Levitas**. Well, the argument that I as a lawyer rather than a legislator would put forward is the argument that the *Chadha* case, leaving aside all of the verbiage that the court put out, simply decided one issue and one statute and did not deal with these other statutes, these other forms, these other manifestations of this process.

In fact, I do not disagree with the result in the *Chadha* case, the narrow specific holding of the *Chadha* case. I disagree with how broad the opinion was, but I do not disagree with that particular result. I think that the only distinctions that you can make, Senator, relate to saying that the—what was that term I learned in law school—ratio decidendi or something like that of the *Chadha* case does not apply to matters like the District of Columbia Code or the Presidential authority under the executive reorganization.

Unfortunately, the court decided the *FERC* case without opinion to let us know how they related *Chadha* to *FERC* and the severability question that was raised in the *FERC* case.

Honestly, I do not see any other argument except saying these cases are not the same thing as the *Chada* case.

Senator **Specter**. Thank you very much. Thank you very much, Mr. Chairman.

Senator **Grassley**. Thank you, Senator Specter. We are finished with our questioning. We thank you very much and look forward to cooperating with you in the future on this very important issue.

I would now like to welcome our next two witnesses; Mr. Christopher DeMuth is the President's choice to head the Office of Information and Regulatory Affairs at OMB. And Mr. Loren Smith is the Chairman of the Administrative Conference of the United States.

I would like to have you proceed as I introduced you. I remind you that we will include the entire text of your testimony in the record and ask you to summarize.

STATEMENT OF CHRISTOPHER DeMUTH, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET; AND LOREN A. SMITH, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. **DeMuth**. Mr. Chairman, thank you very much. I greatly appreciate the opportunity to appear before this subcommittee this morning.

With the Supreme Court's decision in *Chadha* and related cases, the direct and more difficult policy issue has now arisen. Should the President and the Congress agree through legislation to procedures that would approximate the now defunct legislative vetoes over some or all agency rules while avoiding their constitutional pitfalls?

Recent proposals by Members of both Houses and both political parties, by yourself, Mr. Chairman, and by others who have appeared here this morning, have answered this question in the affirmative—but differ substantially on what those procedures ought to be.

The administration has not yet adopted a position on any of these proposals. Our hesitation regarding the various across-the-board regulatory veto proposals is not a result of lack of interest, however. Indeed we believe they are of profound importance and therefore worthy of the most careful deliberation. We are following the congressional debates with close and keen interest and we hope to have a position in the near future.

This morning, if I may, without intimating in any way what the administration's position might turn out to be, I would like to offer for you three general considerations which are guiding our own efforts to think through this issue, in the hopes that they may be of some use to you as well.

First, I believe we should recognize that the various proposals, both before and after *Chadha,* are addressed to a profoundly serious problem.

Over the past four decades, as Congress has extended the reach of the Federal Government into one after another area previously the domain of local governments, private markets, or voluntary private arrangements, the Congress increasingly has lacked the resources of time and information to make all of the judgments and compromises necessary to guide these interventions, and has been forced by the growth of Government itself to delegate lavishly to administrative bureaucracies the responsibility for making what is in effect lawmaking judgments.

The primary response of the executive agencies has been the procedural innovation we now call "informal rulemaking," a sort of three-way hybrid which attempts to combine the efficiencies of executive decisionmaking with the due process of judicial decisionmaking and a degree of public sanction that we associate with legislative decisionmaking.

But informal rulemaking is a very thin substitute for the public sanction afforded by two legislative majorities and the signature of the President. If informal rulemaking solves the problem of high volume lawmaking in the large modern state, it is only at a substantial cost in political accountability and policy coherence.

If it is not exactly true that the bureaucracies are out of control, it is certainly true that the locus of control and its relationship to any articulated conception of the national interest has been increasingly hard to discern. We have seen, especially with the dramatic growth of regulation in the past decade, increased efforts to strengthen the oversight by all three constitutional branches of the Government.

We are familiar with debates in Congress over the Bumpers amendment. As I argued in my testimony before this subcommittee last September, while Congress and others have been debating it, the courts have in effect put it into practice; the strictness and detail of judicial review today is an altogether different order of magnitude than what Congress intended in writing the words "arbitrary, capricious, [or] an abuse of discretion" in the mid-1940's, and we think this is as it should be, given the enormous changes in the nature and economic importance of regulation since the Administrative Procedure Act was passed.

The last four Presidents have adopted increasingly explicit and strict procedures for overseeing the rulemaking activities of the agencies, and I have testified before you on the administration's own efforts in this area under President Reagan's Executive Order 12291.

Congress' increased oversight has taken many forms, and the pre-*Chadha* legislative vetoes were only one. Others included the growth of staff, increasing use of oversight hearings, increased use of appropriations riders, informal consultations between executive officials and Members of the Congress and between executive staff and legislative staff, and, on occasion, direct legislative overrides—as in the case of the saccharin ban and the seatbelt-ignition interlock requirement.

I take it to be the basic proposition of the proponents of the regulatory veto that congressional oversight would be better if it was more formal, explicit, and public. The question, we face is whether, given the huge regulatory machinery that past Congresses and Presidents have created in Washington, it would be politically and administratively practical to adopt the procedure they propose.

My second point is that we should recognize that the new regulatory veto proposals are not the same politically or administratively those which were proposed and in many cases adopted before *Chadha*. *Chadha* does make a difference by reaffirming that Congress makes policy by making law through article I of the Constitution, that it must act jointly, both between the two branches and usually with the President.

The various proposals for regulatory vetoes consistent with *Chadha* present the Congress and the President with a quite different range of options than existed before the decision clarified the constitutional issues. Consider the two major proposals now under consideration. The first would provide Congress an opportunity for a negative veto or a resolution of disapproval, and the second would provide that major rules must be affirmatively approved through joint resolution before taking effect. The first proposal is essentially a "two-house supermajority legislative veto," at least as applied to executive agencies, on the assumption that the President is in favor of the regulations issued by his agencies, although it may come closer to the old two-house simple-majority regulatory veto in the case of the independent agencies.

On the other hand, the affirmative resolution proposals, such as your own proposal, Mr. Chairman, would apply to major rules, and would come very close to the one-house legislative veto. But it would do so only by increasing the policy interdependence of the executive and the legislative branches much more than under the pre-*Chadha* one-house vetoes. It would remain the case that an administration, in proposing major regulations, would be subject to losing those regulations if a majority of either House opposed.

But, on the other hand, under such procedures the President and the executive agencies would have some greater influence over the legislative calendar of the Congress. When a major rule was issued under these proposals, there would be no way at least one House of the Congress could avoid standing up, and taking a vote on the matter. And as you are aware much more than I, timing is everything in the legislative process.

Under any of these proposals, regulatory vetoes would be accomplished only by increasing, perhaps very greatly, the administrative burden on the Congress. Over the past 3 years OMB has published each winter a detailed public report on the agency rules that we have reviewed under Executive Order 12291, including those which have been returned to the agencies or withdrawn because we believed they were inconsistent with the President's order.

It has occurred to me that these reports might be useful in your deliberations, and I will furnish the subcommittee with a complete set of these reports as soon as the 1983 edition is completed next March.

In addition, I have asked my staff to go over all major rules that have been reviewed by OMB over the past 3 years and to prepare an account of those, including a brief description of their policy content, and their subsequent fate in the courts.

[Material referred to was subsequently received and appears at page 100.]

Senator GRASSLEY. We will be glad to receive those reports. Thank you very much.

Mr. DEMUTH. Finally, I think we must all acknowledge there are strong and serious arguments on all sides of these issues. The opponents of regulatory veto proposals have good cause for some concern about the volume and technical detail of the issues that would be coming into the Congress. These would require a great deal of time and attention under any of the regulatory veto proposals.

If I may recall the recent debates over the FCC's access charge issue, it was my experience in talking with several members that there was a sense of frustration about how technically arcane the issues were. This was not because Senators and Representatives are less smart than the bureaucrats at the FCC. It is just that the issues were technical and it was a serious matter of time and priority given other, broader issues before the Congress.

On the other hand, decisions such as these are effectively laws, and a good argument can be made that Congress should spend more time than it does today overseeing the implementation of agency rulemaking. Even though the issues are often technically arcane—or perhaps because they are technically arcane—they have effects on the Nation's economy that are massive and pervasive.

If, as the opponents say, this is already done through a variety of oversight mechanisms, the regulatory veto proponents certainly have a point in saying there is no substitute for a public vote on a concrete policy proposition. While the regulatory vetoes are offered as devices to increase congressional control over the bureaucracies, it is also true that accountability is, as Chairman Dingell in the House has said, a two-edged sword. One may say that lack of public accountability makes things rather too easy for Congress today. One can easily get up and be counted firmly on the record as being in favor of clean air, and against cancer—and then leaving the tough and contentious policy calls that really make a difference to the executive branch. Whichever way the agencies come out, they will be attacked from both sides in the Congress.

To establish a regulatory veto mechanism where the Congress as an institution would have to stand up and be counted, not simply for or against clean air or cancer, but for what exactly should be the emission standard for a specific kind of a pollutant, or for whether a specific product should be banned throughout the

United States, could fundamentally change the nature of regulatory policy and politics. The advocates of freewheeling regulatory growth in the Congress, in the agencies, and in the Washington lobbying establishment, see this clearly, and for this reason are strongly opposed to any form of regulatory veto.

Today these kinds of massive policy decisions are made with little formal congressional input except in extreme cases. The crucial question is whether Congress, given the large volume of such decisions that the regulatory agencies make every year, Congress could oversee them effectively through a formal regulatory veto mechanism, on top of the pressing budgetary and other problems it also must resolve.

Mr. Chairman, thank you very much.

[Material submitted for the record follows:]

PREPARED STATEMENT OF CHRISTOPHER DEMUTH

Chairman Grassley and members of the Subcommittee:

It is a pleasure to appear before you this morning to discuss the proposals for giving Congress a larger and more explicit role in the rulemaking process through one form or another of "regulatory veto." Before the Supreme Court's decisions last term in INS v. Chadha and related cases, the Administration had opposed on constitutional grounds many "legislative veto" provisions and proposals (many of them affecting Executive branch decisions other than rulemaking). At the same time, substantial majorities of both Houses of the previous Congress were on record as favoring some version of legislative veto over agency rules.

Now that the Court has definitively resolved the constitutional issue, we are faced with the more direct and difficult policy issue: Should the President and Congress agree, through legislation, to procedures that would approximate the defunct legislative vetoes over some or all agency rules, while avoiding their constitutional pitfalls? Recent proposals offered by Members of both Houses and both political parties have answered this question in the affirmative--while differing significantly on what those procedures should be. Your own proposal, Mr. Chairman, of Amendment No. 2655 to S. 1080, is one of the most prominent of these proposals.

The Administration has yet to adopt a position on these proposals. Our hesitation regarding the various across-the-board regulatory veto proposals is not a result of a lack of interest. To the contrary, we believe these proposals are of profound importance, and therefore worthy of the most careful deliberation. We are following the Congressional debates on these proposals with great interest, and hope to have a fully developed position of our own in the near future. But, I do not want to leave the impression that we will ultimately conclude by supporting some provision. It may well be that given the existing forms of oversight and the complexities of adding new, constitutional ones, a universal regulatory veto provision is not the best approach. We shall see.

Supporters of regulatory veto focus on the need for Congress to constrain unelected bureaucracies which impose needlessly burdensome and confusing regulatory standards beyond what Congress intended. They argue that rulemaking is essentially lawmaking--and that Congress has granted too much authority for writing laws to Executive and "independent" agencies, and (derivatively) to the courts. Since the Congressional process of lawmaking is inherently one of consensus, negotiation, and compromise, they suggest a regulatory veto would return a share of the broad responsibility granted to others back to the Congress, where--they maintain--it belongs. Regulatory agencies, as they envision it, would continue to perform the technical work of designing rules, and would retain the initiative of drafting and proposing rules. But the final say would rest with the Congress and President through the process of passage of a joint resolution that either approves or disapproves the proposed rules.

Critics of regulatory veto argue on the other hand that the strength of Congress lies in its consideration and determination of broad public policy issues; that the role of Executive regulatory agencies is to provide the technical knowledge and scope of attention necessary to carry out the details of these broad policy decisions. They argue further that regulatory veto will involve intolerable delays and undermine the finality of legislative--and therefore Executive--decisionmaking by a continuing process of second-guessing by one or both Houses. The resulting legal uncertainty will prevent the implementation of statutory programs from becoming clear, thus hindering private efforts to comply with, or benefit from, whatever regulatory standards a given Congress may adopt.

These popular arguments, however, mask more subtle, perhaps more important considerations. Since adoption of any new regulatory veto mechanism presents a very intricate set of new dynamics, it is essential to look first at the existing methods through which the President and Congress now oversee specific agency rulemakings, and then compare these with the proposal for additional forms of Congressional oversight. With this background of existing Presidential and Congressional oversight, we must then decide whether a new mechanism for oversight of agency regulations is really needed.

Clearly, there is a need for both the President and the Congress to oversee the issuance of agency regulations. The President is the Chief Executive, charged with seeing to the execution of the laws. Congress passes those laws. The courts review the actions of each. Mutual oversight exists because the Congress, the President, and the Judiciary are both dependent upon and independent of one another. And this oversight is carried out through a variety of means.

The President has the responsibility, as Chief Executive, to manage the government's administrative apparatus. Last September, I described the essential components of President Reagan's regulatory oversight program--that statutory discretion be exercised to ensure that rules are as cost-beneficial as possible, and that individual rules be reviewed to that end before they are issued. Four Presidents of both political parties have required similar regulatory review procedures, and it is difficult to imagine that any President would discontinue the practice of centralized review so long as regulations are such an important part of the federal policy apparatus.

Most Congressional regulatory oversight is not lawmaking. There are constant oral communications between the Legislative and Executive branches leading to a readjustment of activity and positions, designed to accommodate mutual interests. These types of contacts, which are no different than most informal interagency negotiations, also avoid more formal confrontations. The President, Executive Office staff, Congressional committee chairmen, committee staff, other Members of Congress and their staff, agency heads, agency staff, constituent groups, and the public at large all talk with, meet with, consult with, negotiate with, and accommodate or sometimes litigate against each other to arrive at decisions.

Some Congressional regulatory oversight mechanisms are more formal. They involve Congressional hearings, the enactment of statutes, or detailed budget justifications leading to appropriations. The Congress has several large institutions to help it in these efforts, including its own staffs, the Congressional Budget Office, the General Accounting Office, and the Office of Technology Assessment.

Except in the Senate, where regulatory oversight is also tied to the confirmation process, Congressional regulatory oversight is often tied to the legislative process--to authorizing legislation and appropriations--although strictly oversight hearings are by no means uncommon. Much of the Congress' regulatory oversight is periodic, through annual appropriations, and annual or other fixed terms for reauthorization. And because of the thousands of regulations issued each year, there are frequent discussions between Congress and Executive agencies.

Given the large number and kinds of existing methods by which Congress now oversees agency rulemakings, we have identified specific considerations by which we are evaluating the various proposals for Congressional regulatory veto.

1. Historical. There are several reasons why legislative veto procedures have been enacted in the past. While these may not be decisive now, they are instructive.

Presidents have accepted broad grants of authority from Congress coupled with a legislative veto. Congressmen have used it as a counterbalance to deliberately broad statutory standards, as a means to exert strong influence on Executive interpretation and implementation. House Members have used it to share in regulatory influence provided the Senate by the confirmation process. Authorizing committees have used it to counterbalance the power of appropriations committees. Junior Members have supported the expedited floor votes found in most legislative veto provisions to equalize power held by authorizing committee chairmen. Program opponents have supported it to dilute power of program advocates. The House and the Senate have used it as a check upon the other body.

Experience with prior legislative veto provisions is of limited value, however. We are not aware of any experience with requirements that rules do not take effect unless approved by a joint resolution. Therefore, we do not know the effect on judicial review of rules approved by a joint resolution, for example. Similarly, we do not have experience with joint resolutions of disapprovals of agency rules that are passed by Congress but are not signed by the President. Both of these possibilities are presented by the regulatory veto provisions under discussion. Unfortunately, this absence of experience further compounds the difficulty of deciding with confidence the appropriate mechanism for a regulatory veto.

2. Efficiency. To be effective, a new regulatory veto mechanism should not swamp Congress with new legislative business. The mechanism selected is critical.

At one extreme, Congress could provide expedited procedures to disapprove any agency rule by joint resolution. However, Congress has demonstrated that it can act quickly when it is strongly against a rule--without any legislative veto procedures at all--e.g., the statutory override of the saccharin ban (P.L. 95-203) and the seatbelt-ignition interlock rule (P.L. 93-492). Therefore, some argue that no special provisions are needed or desirable.

At the other extreme, Congress could provide that no agency rule could take effect for a pre-determined time period, and that the rule would go into effect only if it had been approved during this time by joint resolution. Expediting procedures could provide for floor consideration within designated time periods. This would involve moving thousands of additional regulatory matters through Congress and the White House each year, and most of them would be of little Congressional interest. On the other hand, giving Congress increased responsibility and accountability for regulations could have some desirable effects on regulatory policy and agency management.

3. Agency Efficiency. Just as the regulatory veto process should not stymie Congress in its other legislative work, nor should it stymie the ability of agencies to implement statutory obligations. Furthermore, any regulatory veto mechanism should

contain emergency procedures allowing prompt and lasting agency regulatory action. Any provision authorizing legislative veto must also address how changes to rules approved by a joint resolution can be altered by subsequent agency action. Must minor changes to such a rule also be approved by a joint resolution?

4. Executive Accountability. Although the President and officials of the Executive Branch must be accountable to Congress and the public, there can be only one Executive. With so much execution of federal law taking place through regulatory fiats--where large social and economic issues are at stake, statutes often grant wide discretion to agencies and are sometimes downright vague or contradictory, and traditional budget and accounting controls may have little bearing. Strong Executive oversight is essential.

5. Judicial Review. A public law, unlike a regulation, is not subject to review under the Administrative Procedure Act. Unless constitutional considerations require otherwise, a law cannot be overturned by a court on the grounds of having been created in an "arbitrary and capricious" manner as agency rules are.

The effect upon subsequent judicial review of a joint resolution approving--or even disapproving--a regulation is a matter that must squarely be addressed. The statutes providing for a legislative veto could provide that this effect is to preclude further judicial consideration of the rule, except, of course, for constitutional challenges. This would treat an "approved" rule like a statute. On the other extreme, the statute providing for the regulatory veto could purport to provide that the Congressional approval has no effect on subsequent judicial review. In this case, a rule could be overturned by a court for record inadequacies, procedural defects or on any other ground provided by the APA or authorizing statute even though both Houses of Congress and the President have approved a joint resolution supporting the rule. Any law authorizing a regulatory veto must address the effect upon judicial review.

The regulatory veto proposals in Amendment No. 2655 to S. 1080, and in title II of H.R. 3939, offer a combination in procedures. "Major" rules would not take effect without Congressional approval; "non-major" rules would take effect unless disapproved by joint resolution.

Even this proposal, however, entails a substantial increase in Congressional workload. Under Executive Order 12291, OMB reviews 40 to 50 "major" (over $100 million in impact) final rules and about 1,500 "non-major" final rules a year. In addition, OMB does not review the rules of most "independent" regulatory agencies which might involve an additional dozen "major" final rules each year.

To place this in context, over the past ten years, Congress has passed about 200 public laws in its first session; 400 public laws in the second. Adding to Congress' annual legislative calendar 60 or more joint resolutions to affirm major regulations, plus an unknown number of regulatory disapprovals, could increase the number of legislative transactions considered by Congress from 10% to more than 25%. However, Congress' workload might just shift in focus, not increase. Currently, Congress spends most of its time laying down new laws. Regulatory veto would demand "equal time" to ratifying or modifying the application of existing laws--and this, judging from my own experience in reviewing agency rules, would be a healthy development.

Mr. Chairman, thank you for the opportunity to present these views. I assure you we will transmit our views on your amendment to S. 1080 as soon as we can. We wish to commend you and thank you and your colleagues for working so diligently to improve the regulatory process.

Architectural and Transportation Barriers Compliance Board

Minimum Guidelines and Requirements for Standards for Accessibility and Usability of Federal and Federally-funded Buildings and Facilities (published 8/4/82).

Summary: This regulation made more cost-effective federal accessibility standards issued under the Architectural Barriers Act by the General Services Administration, Department of Housing and Urban Development, Department of Defense, and the U.S. Postal Service.

Court Proceedings: None

*****

U.S. Department of Agriculture

Farmers Home Administration Emergency Loan Policies, Procedures and Authorizations, Insured Economic Emergency Loans (published 5/26/81.

Summary: Regulation provided for Farmers Home Administration (FmHA) insured economic emergency loans for farmers, ranchers, agriculture operators, etc., suffering economic emergencies.

Court Proceedings: Kjeldahl v. Block. Docket No. 82-2745 (DDC 10-5-83). Agricultural Adjustment Act of 1983 authorizes Secretary to disburse emergency loan funds. Rules of 5/26/81 allowed to expire on 9/30/81. Suit followed and, as a result, the FmHA was required to reopen economic emergency programs under these rules.

(NOTE: Plaintiff here sued due to non-implementation of a program, he did not challenge the rules themselves.)

*****

Farmers Home Administration Disaster Assistance (published 5/26/81)

Summary: This regulation revised the FmHA regulation used to determine disaster area eligibility for FmHA emergency loans. With this rule, emergency loans are extended only if an area is designated eligible by County and State Disaster Emergency Boards, rather than the FmHA State Directory. This action decreased the number of designated natural disaster areas and resulted in fewer emergency loans.

Court Proceedings: None

*****

1981 Wheat, Feed Grains, Soybeans and Upland Cotton Determinations, Regarding Target Prices, Loan and Purchase Rates (published 6/16/81).

Summary: This notice of determination announced 1981 crop established target prices for wheat, corn, sorghum, barley, and upland cotton; the loan and purchase rates for the 1981 crops of wheat, corn, sorghum, barley, oats, rye, and soybeans; and the absence of a special grazing and hay program for the 1981 crop of wheat.

Court Proceedings: None

CCC Grain Price Support Regulations Governing the Wheat Reserve Program for 1981 and Subsequent Crops (published 8/13/81).

Summary: This rule stabilized wheat prices and support for farm income.

Court Proceedings: None

*****

Food Stamp Program--Household Composition Income Standards, Initial Month Benefits, Adjustments, Deductions and Outreach (published 9/4/81).

Summary: This regulation changed household definitions, food stamp eligibility, household benefits, income eligibility update schedules, and COLA deductions. This rule also implemented a minor provision of the 1980 Food Stamp Amendments.

Court Proceedings: Levesque v. Block (1st Circuit Court of Appeals; No. 83-1341; decided 12/20/83). In this New Hampshire case, the Court ruled that USDA violated the Administrative Procedure Act by publishing the rule as an interim rule without prior notice and comment. Though the court found that USDA should have published a proposed rule, it overturned a lower court's decision requiring the Department to republish the final rule of 11/19/82. It also ordered the Department to assume the liability for retroactive benefits owed between the publication of the interim rule and the final rule.

*****

Part 1980 and 1990--A Guaranteed Loan Program (published 10/18/82).

Summary: This final rule prohibited the FmHA from guaranteeing loans which involve tax-exempt bond funds, either directly or indirectly. This rule therefore put FmHA fund uses more in line with the original intent of FmHA's lending mandates.

Court Proceedings: None

*****

National Average Payment Factors, Elimination of October and March Estimates, Maximum Reduced Price Charge for National School Lunch and School Breakfast Programs (published 10/20/81).

Summary: This rule revised regulations regarding the "national average payments"--the amount of money the federal government gives states for meals served in the National School Lunch and School Breakfast programs. This rule also eliminated the October and March estimates and increased the price charged for each meal.

Court Proceedings: None

*****

National Average Minimum Value of Donated Food for Period July 1, 1981 through June 30, 1982 (published 12/8/81).

Summary: This notice reduced the value of commodity subsidies for federally subsidized meal programs authorized by the National School Lunch Act and announced the value of donated foods given for lunches in the National School Lunch Program from July 1, 1981 through June 30, 1982.

Court Proceedings: None

*****

FmHA Instruction 1944-A, Section 502 Rural Housing Loan Policies, Procedures and Authorizations (published 12/21/81).

Summary: This rule revised the income eligibility guidelines for rural housing loans by liberalizing them and setting area, rather than national, income limits.

Court Proceedings: None

*****

National Forest System Land and Resources Management Planning Function: Conservation and Land Management (published 9/26/82).

Summary: This rule streamlined the land management planning process to maximize net public benefits from National Forest System lands. It revised the content and purpose of the regional plan, reorganized material, and made other necessary technical revisions.

Court Proceedings: None

*****

CCC Grain Price Support Regulations Governing Feed Grain Reserve Programs for 1981 and Subsequent Crops and Alternative Program for 1980 and Prior Crops (published 3/4/82).

Summary: These rules govern farmer-owned reserves of wheat and feed grains, including eligibility criteria and criteria for release of grain from the reserve. The rule announced changes which simplified the farmer-owned grain reserve program and publicized the Secretary's announcement which authorized the immediate entry of 1981 crop seed grains into the grain reserve.

Court Proceedings: None

*****

Puerto Rico Nutritional Assistance Grant (published 7/27/82).

Summary: This rule converted the federal Food Stamp Program in Puerto Rico into a nutritional assistance block grant. It changed the method of benefits disbursement from coupon issuance to cash grants pursuant to the provisions of the Omnibus Budget Reconciliation Act.

Court Proceedings: None

*****

Adjusting Thrifty Food Plan Amounts (published 3/19/82, modified final rule 9/14/82) 2 rules.

Summary: This rule modified the Thrifty Food Plan adjustment schedule to reflect Consumer Price Index changes, in accordance with requirements of the 1981 Food Stamp and Commodity Distribution Amendments, P.L. 97-98.

Court Proceedings: None

Monthly Reporting/Retrospective Budgeting Revisions to Model Food Stamp Forms (published 5/25/82).

Summary: This rulemaking provided guidance on implementing sections 107 and 108 of the Omnibus Reconciliation Act of 1981, P.L. 97-35, which required state agencies to implement a monthly reporting/retrospective budgeting system. In addition, this rule required that a family's food stamp allotment be based on its past, rather than future, financial circumstances.

Court Proceedings: Donna Saldivar v. McMahon (California Welfare Agency Director) (No. 83-4637) and McMahon v. Block and Heckler (U.S. District Court in the Northern District of California; No. C83-4637 SG). This case was a constitutional challenge alleging that not providing a household a notice of benefit reductions within ten days prior to such reductions, as the rule states, violated the due process clause of the Constitution. The case was decided in District Court in USDA's favor. The Court held that ten days was reasonable and not required if other due process procedures for benefit reinstatement existed. These did exist in the rule, as a provision for reinstatement of benefits within five days after a household request a hearing on their benefit reduction was clearly in place.

*****

Proration of Initial Month Benefits for Food and Nutrition Assistance Programs (published 5/14/82).

Summary: This regulation reduced costs of the food stamp program by prorating household benefits for the initial application month instead of making benefits retroactive to the first day of the month.

Court Proceedings: None

*****

Notice of Determination of Provisions Regarding 1982 Crop Cotton (published 6/15/82).

Summary: This rule announced price support and production adjustment provisions for 1982 cotton crop: the determination was published following enactment of P.L. 97-98.

Court Proceedings: None

*****

1982 Wheat Program--Determinations Regarding the Proclamation of 1982--Crop Program Provisions for Wheat (published 7/6/82).

Summary: This rule affirmed determinations announced by press release on 1/29/82 regarding provisions of the 1982 wheat program and implemented a 15 percent acreage reduction program.

Court Proceedings: None

*****

Price Support Loan Program for 1982 Crop Sugar Beets and Sugar Cane (published 10/20/82).

Summary: This rule announced price support, eligibility criteria and loan rates for 1982 crops of sugar beets and sugar cane as mandated by the Agriculture and Food Act of 1981.

Court Proceedings: None

*****

1982 Feed Grain Program--Determinations Regarding the Proclamation of 1982--Crop Program Provision for Corn, Sorghum, Barley, Oats and Rye (published 7/27/82).

Summary: This rule established subsidy, loan rates, and acreage reduction paid diversion for 1982 crops of corn, sorghum, barley, oats, and rye.

Court Proceedings: None

*****

1983 Feed Grain Program--Determinations Regarding 1983--Crop Program for Corn, Sorghum, Barley, Oats and Rye (published 4/11/83).

Summary: This rule established subsidy, loan rates, and acreage reduction paid diversion for 1983 crops of corn, sorghum, oats, barley and rye.

Court Proceedings: None

*****

CCC Grain Price Support Regulations Governing the Grain Reserve Program for 1982 and Subsequent Crops and Alternative Program for 1981 and Prior Crops (published 8/16/82, 10/8/82, and 11/14/83) 3 rules.

Summary: These rules implemented a new reserve program for 1982 crops as mandated by the Agriculture Act of 1981.
Court Proceedings: None

*****

1982-1983 Milk Price Support (published 9/24/82, revised 3/17/83) 2 rules.

Summary: This notice announced the 1982-83 support level for milk and the purchasing prices for butter, cheese and non-fat dry milk and the 50 cents deduction per hundred weight for all milk marketed commercially.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

Household Composition, Income Standards, Adjustments, Deductions, and Outreach (Model Food Stamp Forms) (published 11/19/82).

Summary: This rule restricted eligibility for and reduced benefits of the Federal Food Stamp Program by implementing for fiscal year 1982 changes in the definition of a household, household food stamp eligibility requirements, primary and ultimate household benefits, and the date when the USDA made cost of living adjustments for benefits and allowable deductions.

Court Proceedings: Levesque v. Block (1st Circuit Court of Appeals; No. 83-1341; decided 12/20/83). In this New Hampshire case, the Court ruled that USDA violated the Administrative Procedure Act by publishing the rule as an interim rule without prior notice and comment. Though the court found that USDA should have published a proposed rule, it overturned a lower court's decision requiring the Department to republish the final rule of 11/19/82. It also ordered the Department to assume the liability for retroactive benefits owed between the publication of the interim rule and the final rule. A petition for a rehearing has been filed and the issue of presenting the case to the Supreme Court is now being discussed.

*****

Determinations Regarding the Proclamation of the 1982 Program--Provisions for Rice (published 7/6/82).

Summary: This notice established subsidy, loan rates and acreage adjustment paid diversion for 1982 rice crop. The Secretary of Agriculture is required by statute to announce the 1982-Crop Rice Program provisions. Producers need to know these determinations in making their planting decisions.

Court Proceedings: None

*****

Mechanically Processed Species Product (published 6/29/82).

Summary: This rule amended the federal meat inspection regulations to relax labeling and compositional requirements for mechanically separated species products, and permit its use in a wider variety of products. These changes would permit more efficient use of meat producing animals, with savings expected to accrue to meat packers and to consumers.

Court Proceedings: Consumer Nutrition Institute v. Block, Secretary of Agriculture, Federal District Court, D.C. Civil Action 82-2009. The court found that Agriculture's actions were not arbitrary and capricious. CNI has appealed this decision, and the case is pending.

*****

Special Program of Payment-In-Kind for Acreage Diversion for 1983 Crops of Wheat, Corn, Grain Sorghum, Upland Cotton, and Rice--7 CFR Part 770 (published 1/10/83 and 3/4/83, modified)--Two rules.

Summary: This rule pays producers for not producing crops (corn, wheat, tobacco, etc.). Payment is made in kind, not in dollars.

Court Proceedings: There are three cases pending. One case seeks inclusion of popcorn as a commodity covered by the program. A writ of certiorari (83-1239) has been filed with the Supreme Court. The other two cases pertain to the statutory optional $50,000 limitation on the value of commodities which any one producer may receive. The first case, Eastern District of California No. S-83-1349 RAR, seeks application of the limit to 1983 crops. The second, Eastern District of Washington No. C-84-073-RJM, seeks exemption of the 1984 crop from the limitation.

*****

1982-1983 Milk Price Support (published 9/4/82).

Summary: This rule announced the milk price support level for 1982-83 at the same level as the previous year, and announced the first fifty cent per hundredweight deduction on the price received by the producer. These announcements became effective on 10/1/82.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

*****

Determinations Regarding the Proclamation of 1983--Crop Program Provisions for Wheat (published 5/11/83).

Summary: This rule sets commodity support factors such as subsidy, loan rates, target prices, and acreage control for 1983 wheat crops.

Court Proceedings: None

*****

Water and Waste Disposal Development (published 5/5/83).

Summary: This rule provided grants and loans for water and waste disposal system development projects in areas of high unemployment. Under Public Law 98-8, the Emergency Jobs Bill, the rule determines eligibility for recipient localities and applies other restrictions on uses of funds.

Court Proceedings: None

*****

Monthly Reporting and Retrospective Budgeting (published 12/8/83).

Summary: This rule changed the basis of a household's food stamp allotment. A household's future financial circumstances are now considered in the computation of benefits rather than its past circumstances. The rule also required the monthly reporting of these circumstances by households.

Court Proceeding: None

*****

Dairy Price Support Program (published 8/1/83).

Summary: This rule announced revised rules for collecting the two fifty cents per hundredweight deductions from prices received by producers and provisions for the refund of the second fifty cents.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the

United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

1982-83 and 1983-84 Milk Price Support Program (published 8/2/83).

Summary: This notice of determination established support levels for the 1982/83 and 1983/84 Milk Support Program. It announced the second fifty cents per hundredweight deduction for September 1983 and the 1983/84 marketing year as well as set the milk price support level for 1983/84 at $13.10.
Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

Food Stamp Program--Adjusting the Thrifty Food Plan and Deductions (published 10/5/83).

Summary: This rule adjusted the food plan for a family of 4 which serves as the basis for food stamp allotments for FY 84. There were no significant changes from the food plan from FY 83.

Court Proceedings: None

*****

Price Support Loan Program for 1983 through 1985 Crops of Sugar Beets and Sugar Cane (published 10/5/83).

Summary: This interim rule set price support, eligibility criteria, and loan rates for 1983-85 crops of sugar beets and sugar cane.

Court Proceedings: None

*****

1983-84 Milk Price Support Program (published 1/3/84).

Summary: This rule establishes procedures for deducting 50 cents per hundred weight of milk from prices paid to producers.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

*****

Milk Price Support Level and CCC Purchase Prices (published 12/16/83).

Summary: This rule lowered support price and purchase price for milk by 50 cents per hundredweight effective December 1, 1983 through March 31, 1985.

Court Proceedings: None

*****

New National Forest Timber Sale Procedures (published 4/15/82).

Summary: This rule revised policy affecting bid prices for timber sales in three western states.

Court Proceedings: None

*****

Price Support Purchase Program for 1982 Crop Sugar Beets and Sugar Cane (published 2/24/82 interim and 5/28/82 final) 2 rules.

Summary: This rule implemented a price support purchase program for 1982 crop raw cane sugar and refined beet sugar as mandated by the Agriculture Act of 1981.

Court Proceedings: None

*****

Milk Diversion Program (published 1/4/84).

Summary: This rule established procedures for milk producers to participate in ASCS program which pays producers $10 per hundredweight for each hundredweight of reduced product.

Court Proceedings: None

*****

1981-1982 Milk Price Support (published 9/24/82).

Summary: This notice announced the 1981-82 support level for milk and the purchase prices for butter, cheese, and nonfat dry milk.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

*****

Commodity Credit Corporation Interim Rule Implementing Deductions from Dairy Farmers (published interim final 9/13/82).

Summary: Interim rule established the Administrative Procedure for deducting 50 cents per hundred weight from dairy farmers' proceeds and remitting the monies to the Commodity Credit Corporation.

Court Proceeding: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

Standards for Grades of Carcass Beef Standards for Grades of Slaughter Cattle (Withdrawal of NPRM 9/28/82).

Summary: In response to comments received, decision was made to withdraw proposal.

Court Proceeding: None

*****

Commodity Credit Corporation Final Rule Implementing Deductions from Dairy Farmers (published interim final 11/23/82).

Summary: Established the administrative procedure for deducting 50 cents per hundredweight from dairy farmers' proceeds and remitting the monies to the Commodity Credit Corporation.

Court Proceeding: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

*****

Footnote to Milk Price Support rules: Besides the South Carolina case discussed under **Court Proceedings** above, there are 10 other cases in various stages of litigation.

-Northern District of New York, 82-CV-1191. This case is on appeal with 2nd Circuit Court of Appeals. The decision of the lower court partially supported the United States--the government asked for summary judgment on most of the complaint with the remainder yet to be decided.

-Utah District Court, NC-82-0222W. See above.

-Eastern District Court of Wisconsin, 82-C-1602. Judgment rendered in favor of the United States.

-Middle District Court of Pennsylvania, 83-0476. Decision yet to be made, although government has prevailed on several elements.

-Western District Court of Texas, 7A83CA179. Case dismissed.

-Western District Court of New York, CV-83-0022T. Case is pending, an appeal has been filed.

-District Court of Puerto Rico, 83-0519(RA). Presently, there is a motion for summary judgment.

-Northern District Court of New York, 83-CV-83. Case is pending, awaiting the South Carolina appeal to the Supreme Court and the decision on the 82-CV-1191 case above.

-District Court of Idaho, 82-4187. Judgment in government's favor.

-Southern District Court of New York, 83-CIV-4531-MEL. Pending on summary judgment.

Department of Commerce

Interpretation of the Term "Directly Affecting the Coastal Zone", Notice of Suspension of Effective Date, Notice of Proposed Rescission, Notice of Withdrawal of Final Rule (published final 7/9/81, withdrawal 1/29/82).

Summary: The Coastal Zone Management Act of 1972 provides that "each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state coastal zone management programs." On July 9, 1981 the Department of Commerce issued final regulations to define the term "directly affecting." On January 29, 1982 the Department withdrew this final rule.

Court Proceedings: On January 11, 1984 the U.S. Supreme Court issued its decision in Secretary of the Interior et. al. v. California et. al., No. 82-1326 that the sale of Outer Continental Shelf oil and gas leases is not an activity "directly affecting" the coastal zone.

*****

Ocean Thermal Licensing Regulations (published 7/31/81).

Summary: These regulations established the procedures for licensing ocean thermal energy production facilities.

Court Proceedings: None

*****

Deep Seabed Mining Regulations for Exploration Licenses (published 9/15/81).

Summary: These regulations established the procedures for obtaining licenses to permit the exploration of the deep seabed for hard mineral resources that could be commercially recovered.

Court Proceedings: None

*****

Continued Suspension of Final Rules--Channel Islands and Point Reyes--Farallon Islands National Marine Sanctuaries (published continued suspension 9/30/81, withdrawal 4/30/82) 2 rules.

Summary: On April 29, 1981, the Department of Commerce published final regulations governing the management of the Channel Islands and Point Reyes--Farallon Islands National Marine Sanctuaries. On March 31, 1981 Commerce suspended those portions of the regulations prohibiting hydrocarbon development within either sanctuary. On April 30, 1982 Commerce published a notice stating that it had completed its review of the regulatory impact analysis supporting this suspension of hydrocarbon development and concluded that there was no reason to continue the suspension. The April 30, 1982 notice stated that the suspension was discontinued effective March 30, 1982.

Court Proceedings: On September 28, 1982 the Western Oil and Gas Association filed suit challenging the Department of Commerce's authority to designate marine sanctuaries and prohibit hydrocarbon development. All parties have agreed not to pursue the case pending the outcome of Congressional action on the Department of Commerce's authority under the marine sanctuary program.

*****

Elimination of Quantitative Limitations on Exports of Refined Petroleum Products (published 10/6/81).

Summary: The rule eliminated quantitative restrictions on the export of all refined petroleum products and thereby reduced the reporting and recordkeeping requirements imposed on petroleum exports.

Court Proceedings: None

*****

Handicap Amendment to Civil Rights Requirements on EDA Assisted Projects (published 4/23/82).

Summary: These regulations implement the prohibition against handicap discrimination, as provided in Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S. Code 794). Section 504 was made applicable to the General Revenue Sharing program by its inclusion in the 1974 amendments to the Revenue Sharing Act.

Court Proceedings: None

*****

Pacific Halibut Fisheries (published 6/18/83).

Summary: Rule imposed a moratorium on the entry of certain fishermen and vessels into the halibut fishing industry in waters off the coast of Alaska.

Court Proceedings: None

*****

Department of Energy

Fuel Use Act Regulation Revisions (published 12/7/81).

Summary: This regulation reduced the requirements for obtaining Fuel Use Act prohibition exemptions for owners and operators of new and existing electric powerplants as well as major fuel burning installations.

Court Proceedings: None

*****

Variable Net Profit Share Bidding System for Outer Continental Shelf Oil and Gas Leases (published 6/2/81).

Summary: This rule created a new bidding system for use in lease sales and established a procedure for determining net profit share payment for Outer Continental Shelf oil and gas leases.

Court Proceedings: None

*****

Residential Conservation Service--Revision of Rules (published 6/17/82).

Summary: DOE amended RCS program regulations to provide greater state and utility flexibility and permit reductions in program implementation costs.

Court Proceedings: None

*****

Residential Conservation Service Federal Standby Plan (published 9/27/83).

Summary: This regulation implements a federal RCS program for utilities in those states that do not have an adequate RCS plan.

Court Proceedings: None

*****

Energy Conservation Program for Consumer Products (published 8/30/83).

Summary: This rule would establish "no-standard" standard for each of the six appliance categories under consideration.
Court Proceedings: NRDC and Others v. DOE, D.C. Circuit Court of Appeals (Docket Nos. 83-1195 and Others).

*****

Environmental Protection Agency

RCRA--Withdrawal of Midnight Regulations (published 10/20/81).

Summary: This rule proposed to suspend the effective date of the January 1981 permitting standards for existing incinerators and storage surface impoundments pending reexamination. It did not, however, pertain to voluntarily submitted permit applications. Standards were reinstated before the rule became final.

Court Proceedings: EPA originally suspended permitting standards without notice and comment. EDF filed suit, but before the case was resolved EPA issued the proposed rule suspending the standard. Nevertheless, the D.C. Circuit Court overturned the original action.

*****

Standards for Owners and Operators of Hazardous Waste Land Disposal Facilities (withdrawn 4/21/82).

Summary: The Environmental Protection Agency (EPA) is required by the Resource Conservation and Recovery Act (RCRA) to issue standards applicable to owners and operators of hazardous waste management facilities. These standards are to be used in issuing permits for facilities that store, treat, or dispose of hazardous waste.

Court Proceedings: In regard to Land Disposal litigation, 15 separate petitions have been filed by both industry and environmentalists. Since parties are trying to negotiate an agreement, no briefs have yet been filed.

*****

Standards for Owners and Operators of Hazardous Waste Land Disposal Facilities (published 7/26/82).

Summary: This interim final rule amended existing regulations to establish standards for new and existing hazardous waste management facilities that store, treat, and dispose of hazardous waste. The facilities include landfills, land treatment facilities, waste-piles, and surface impoundments.
Court Proceedings: Twenty separate petitions have been filed by both industry and environmentalists. EPA and the petitioners are currently attempting to negotiate an agreement; no briefs have yet been filed.

*****

National Oil and Hazardous Substances Contingency Plan (published 7/16/82).

Summary: The revised NCP implements the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). CERCLA requires that actions taken in response to release of hazardous substances to the extent practicable be consistent with the NCP.

Court Proceedings: EDF et. al. v. EPA, Dockets #82-2234 and 2238, D.C. Court of Appeals. The Environmental Defense Fund sued EPA for lack of specificity in the plan in D.C. Circuit Court. The suit has been settled, and EPA has agreed to make certain amendments to the plan.

*****

Premanufacture Notification and Review Procedures (published 5/13/83).

Summary: This rule establishes premanufacture notice requirements and review procedures under section 5 of the Toxic Substances and Control Act. Under section 5 of TSCA, persons must notify EPA at least 90 days before they begin to manufacture or import a new chemical substance. Section 5(d)(1) defines the contents of the notice to EPA. EPA reviews the notice to determine whether regulatory action under section 5(e) or 5(f) is warranted. EPA may grant test-marketing exemptions to applicants if they show that a new chemical substance will not present an unreasonable risk to health or the environment.

Court Proceedings: None

*****

Iron and Steel Manufacturing Point Source Category Effluent Limitations Guidelines (published 5/27/82).

Summary: This rule set mass-based effluent standards, establishing the maximum amount of a pollutant which may be discharged per 1,000 pounds of product, and set a compliance date for the steel industry categorical pretreatment standards.

Court Proceedings: Existing regulations result from a 1976 court remand and amendments to the Clean Water Act. EPA has published a proposed settlement agreement of the current litigation (National Steel Corp. v. EPA, No. 82-3225).

*****

Department of Health and Human Services

Aid to Families with Dependent Children (published 9/21/81 interim and 2/5/82 final) 2 rules.

Summary: This rule implemented changes made in the Aid to Families with Dependent Children (AFDC) program by Title XXIII of the Omnibus Reconciliation Act of 1981 (P.L. 97-35). It provided for greater state flexibility in developing work alternative and incentive programs, established improved need assessment standards, and improved program administration.

Court Proceedings: Approximately 150 suits have been filed. HHS won the procedural challenges to the interim final rulemaking. HHS is prevailing in about 50% of the the cases and is in the appeals courts in the remaining cases (two cases have been appealed to the Supreme Court).

*****

Reduction in Payments to the States--Medicaid (published 9/30/81).

Summary: This regulation implemented section 2161 of the 1981 Budget Reconciliation Act and specified how states may reduce funding losses resulting from provisions of the Act. The regulation describes conditions under which offsets are permitted against federal financial participation reductions in Medicaid.

Court Proceedings: None

*****

Determination of Reasonable Charges for Medical and Health Care Services (published 12/31/81).

Summary: This rule amended regulations concerning the payment of reasonable charges for services furnished under Part B of the Medicare program. Section 946 specifies that medical or other health care service payment will be based on customary and prevailing charge screens in effect at the time the services are furnished rather than at the time of claim or payment request. The statute also requires that HHS not go back further than the immediately preceding fee screen year to determine reasonable charges for claims filed after long delays.

Court Proceedings: None

*****

BPP-215-FC Limitation of Reasonable Charges for Services in Hospital Outpatient Settings (published 10/1/82).

Summary: This regulation establishes limits on Medicare payments for certain types of physician services furnished in hospital outpatient settings based on the charges for similar services furnished in physicians' offices.

Court Proceedings: None

*****

Limitations on Payment for Services Furnished to Employed Aged and their Spouse (published 4/12/83).

Summary: This final notice made Medicare payments secondary to benefits payable under an employer group health plan for services furnished to employed individuals and their spouses age 35 through 69.

Court Proceedings: None

*****

Payment for Physician Services Furnished in Hospitals, SNFS, and CORF's (published 3/2/83).

Summary: These regulations revised coverage conditions and reimbursement methods for physician services compensated by medicare providers in hospitals, SNFS, and CORF's. They include special conditions for anesthesia, radiology, and pathology services.

Court Proceedings: The College of American Pathologists (CAP) sued HHS unsuccessfully in D.C. District Court. District Court Opinion, CCH, Medicare/Medicaid Guide, TP 32932 (D.D.C.) CAP has appealed to D.C. Court of Appeals, but no hearing has been held. HHS is attempting to modify CAP with changes to carrier guidelines. College of American Pathologists, et. al. v. Heckler, No. 83-1706 (D.C. Cir.) In addition, a group of anesthesiologists sued HHS in D.C. District Court. HHS has filed a motion for summary judgment and the plaintiffs have not responded. Donovan Campbell, MD et. al. v. Heckler, et. al., Civ. No. 83-2352 (D.D.C.)

*****

BPP-9-F, Hospital Insurance Entitlement and Benefits (published 3/25/83).

Summary: These regulations implemented 13 legislative amendments concerning Medicare entitlements, post-hospital nursing and home health services, beneficiary co-insurance, and amounts of and enrollment by premium paying Medicare recipients. They also simplify and redesignate certain existing Medicare regulations.

Court Proceedings: None

*****

Prospective Reimbursement for Dialysis Service and Approval of Special Purpose Renal Dialysis Facilities (published 5/11/83).

Summary: These regulations (1) establish a prospective payment method for maintenance dialysis furnished at home or in a hospital based or independent renal dialysis facility, (2) establish a mandatory monthly capitation payment for physician's services related to maintenance dialysis, (3) discontinue provisions for target rate payment for home dialysis and 100% requirement for home dialysis.

Court Proceedings: A suit is pending in D.C. District Court brought by National Association of Patients and Hemodialysis and Transplantation, Renal Physician Association, and Bio-Medical Application. The case has been briefed fully and is awaiting the judge's decision. National Association of Patients & Hemodialysis & Transplantation, et. al. v. Heckler, Civ. No. 83-2210 (D.D.C.)

*****

Prospective Payments for Medicare Inpatient Hospital Services (published interim 9/1/83, final 1/3/84).

Summary: These regulations implement Title VI of the Social Security Amendment of 1983 which changed the method of payment for inpatient hospital services from a cost-based, retrospective reimbursement system to a prospective payment system based on diagnosis.

Court Proceedings: This rule has experienced a broad-based challenge to the method of determining base year cost and weight assigned to DRGs. These suits were brought in January by hospital providers who have not yet exhausted administrative procedures. In addition, a case was brought in January on behalf of those groups delivering labor/delivery room service seeking to have base year rate calculations redetermined. D.C. District Court.

*****

Department of Housing and Urban Development

One-Time Mortgage Insurance Premium, Amendment to Part 203 for Certain Single Family Morgtages Insured under the National Housing Act (published 6/23/83).

Summary: This rule established a new system for collecting certain single family mortgages which HUD insures under Section 203 of the National Housing Act. Under this new system, the borrower pays a single premium when the mortgage loan is closed so that lenders are not forced to collect and remit to HUD monthly installment mortgage insurance premiums.

Court Proceedings: None

*****

Department of Interior

1981-83 Migratory Game Bird Hunting Regulations (published 1981 thru 1983). Twelve final rules.

Summary: The Service established hunting seasons, daily bag and possession limits, and shooting hours for designated groups or species of migratory game birds in the contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands.

Court Proceedings: None

*****

Oil and Gas Leasing (Amendment Increasing Noncompetitive Fee) (published 1/20/82).

Summary: This rule increases the filing fee for a non-competitive oil and gas lease application from $25 to $75.

Court Proceedings: Thompson v. Watt, D.C. Circuit Court of Appeals, Docket No. 82-1528.

*****

Oil and Gas Leasing--National Petroleum Reserve--Alaska (published 11/9/81).

Summary: This rule outlined procedures for oil and gas leasing in the National Petroleum Reserve--Alaska--and instituted a competitive bidding system for awarding leases on lands in the reserve determined suitable for oil and gas leasing.

Court Proceedings: None

*****

Acreage Limitation (43 CFR 426) (published 12/6/83).

Summary: This rule established policies and procedures for administering acreage limitation and other provisions of the Reclamation Reform Act of 1982.

Court Proceedings: None

*****

Conversion to Hydrocarbon Leases (published 5/24/82).

Summary: Provides for procedures to connect existing oil and gas leases and valid claims to combined hydrocarbon leases in specified tar sand areas.

Court Proceedings: None

*****

Intergovernmental Review of Department of Interior Programs and Activities (published 1/14/83).

Summary: This rule revised DOI's program for coordination with state and local governments.

Court Proceedings: None

*****

Department of Labor

Suspension of Pension Benefits (published 12/4/81).

Summary: Section 302(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) sets forth the circumstances under which ERISA permits a retiree's pension benefit payments to be suspended by reason of the retiree's re-employment. The Department's "suspension of benefits" regulation, 29 CFR 2530.203-3(b)(5), states, as one of the suspension rules, that a plan may provide that an employee must either certify that he is unemployed or supply factual information sufficient to establish that any employment does not include service for which benefits may be suspended.

Court Proceedings: Bonner, et. al. v. Donovan CV-83-5413-LTL(BX) (D.D. Ca). On August 19, 1983, a lawsuit against the Secretary of Labor was filed on behalf of the trustees of the Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California (the "trust" or "plan"), seeking a declaratory judgment with respect to certain rules and policies of the trust relating to the verification of employment of retirees who may be ineligible for benefits from the trust by virtue of their post retirement employment. On two previous occasions, the Department's staff had opined that under the "suspension of benefits" regulation, the trustees of the plan would not be permitted to withhold the payment of pension benefits to a retiree due to the retiree's failure to comply with the trust's current verification of employment rules, which require the retiree to furnish annually the complete front page and signature page of his or her federal income tax return and, where earned income is claimed to be attributable to employment of the retiree's spouse, the W-2 forms of the spouse. At issue is whether the plan exceeded its authority by requiring the retiree to furnish all of that federal tax information. The Department is currently engaged in settlement discussions with attorneys for the plaintiffs.

*****

Suspension of Pension Benefits (published 9/30/81).

Summary: This rule deferred the effective date of regulation governing the circumstances under which pension plans may impose forfeitures of pension benefits due to employment activity.

Court Proceedings: Bonner, et. al. v. Donovan CV-83-5413-LTL(BX) (D.D. Ca). On August 19, 1983, a lawsuit against the Secretary of Labor was filed on behalf of the trustees of the Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California (the "trust" or "plan"), seeking a declaratory judgment with respect to certain rules and policies of the trust relating to the verification of employment of retirees who may be ineligible for benefits from the trust by virtue of their post retirement employment. On two previous occasions, the Department's staff had opined that under the "suspension of benefits" regulation, the trustees of the plan would not be permitted to withhold the payment of pension benefits to a retiree due to the retiree's failure to comply with the trust's current verification of employment rules, which require the retiree to furnish annually the complete front page and signature page of his or her federal income tax return and, where earned income is claimed to be attributable to employment of the retiree's spouse, the W-2 forms of the spouse. At issue is whether the plan exceeded its authority by requiring the retiree to furnish all of that federal tax information. The Department is currently engaged in settlement discussions with attorneys for the plaintiffs.

*****

Labor Standards Provisions Applicable to Contracts Federally Financed (not ever published).

Summary: This rule is authorized under Reorganization Plan No. 14 of 1950 and the Leland Act in order to coordinate the administration and enforcement of the labor standards provisions in the Davis-Bacon Act and the related Acts by the Department of Labor and the Federal Contracting Agencies.

Court Proceedings: Rule was enjoined by U.S. Court of Appeals before publication. (See Procedures for Determination of Wage Rates--Davis Bacon below.)

*****

OSHA Hearing Conservation Regulations (published 8/21/81).

Summary: This rule established the occupational noise standard and specifies elements of hearing conservation programs (such as requirements for monitoring employee noise exposure, annual audiometric testing for employees exposed above certain levels, and the guidelines for selection of hearing protectors).

Court Proceedings: Forging Industry Assoc. v. Secretary of Labor, No. 82-1232 (4th Cir.) The Forging Industry Association filed its petition for review on May 6, 1983. The National Arborist Association intervened on the side of the petitioner. The parties and intervenor submitted briefs. The parties are awaiting oral argument; no date has been set.

*****

Procedures for Determination of Wage Rates--Davis Bacon (published 5/28/82).

Summary: This rule establishes procedures for determination of prevailing construction wages to be paid by federal government.

Court Proceedings: The Department issued its final rules on May 28, 1982. This rulemaking was challenged in a suit filed in the U.S. District Court for the District of Columbia (Building and Construction Trades Department, AFL-CIO, et. al. v. Raymond J. Donovan et. al.) In its decision of December 23, 1982 (543 F. Supp. 1282), the district court enjoined the following sections of the regulations: 29 CFR 1.3 (exclusion of Davis-Bacon construction in wage determinations); 1.7(b) (exclusion of metropolitan data in wage determinations), 1.7(d) helpers; 3.3 (b) (elimination of the requirement for weekly submission of payrolls by contractors); 5.2(n)(4), 5.5(a)(1)(ii)(A), and 5.5(a)(4)(iv) (helpers); and 5.5(a)(ii) and 5.6(a)(2) and (3) (Copeland Act requirements).

The Department appealed this injunction. By separate notice in the Federal Register of April 29, 1983, the Department implemented those provisions of the final rules to the extent permitted by the injunction and deferred the enjoined provisions until further notice pending the outcome of the appeal.

On July 5, 1983, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision largely upholding the enjoined provisions. 712 F. 2d 611. However, the appeals court held invalid one aspect of the helper regulation as well as the regulatory changes concerning the Copeland Act requirements contained in sections 5.5(a) (3)(ii) and 5.6(a)(2) and (3), which would have allowed contractors to submit weekly statements of compliance in lieu of payroll information on each employee.

On October 26, 1983, the Building Trades filed a petition for writ of certiorari in the U.S. Supreme Court for a review of the appeals court decision. On January 16, 1984, the U.S. Supreme Court denied the petition, thus permitting the Court of Appeals to issue its mandate lifting the injunction of those regulations which were upheld by the appeals court decision. Once that mandate is issued, and the district court enters a modified injunction, the Department will publish a Federal Register notice which will implement and announce the effective data of the regulations from which the stay will be lifted.

*****

OSHA Hazard Communication (published 11/25/83).

Summary: This rule required employers in manufacturing firms to implement a hazard communication program, including use of safety sheets, labels, and training.

Court Proceedings: United Steelworkers of America v. Auchter, No. 83-3554 (3d Cir.) Challenges based on issues including preemption, trade secrets, scope, specificity, and hazard determination procedures currently are being heard in eight Circuit Courts. Eight petitions for review of this standard have been filed in five circuits. The first petition filed is that listed above. The Secretary is taking action to transfer all cases filed in other circuits to the Third Circuit and to have the transferred cases consolidated. On the Secretary's motion, the Third Circuit has held the briefing schedule in abeyance pending transfer of all cases to the Third Circuit.

*****

OSHA Occupational Exposure to Lead (published 12/11/81).

Summary: This rule established a standard which would limit exposure to 50 ug/cubic meter and blood lead levels to 60 ug/100 ml.

Court Proceedings: United Steelworkers of America v. Auchter, No. 83-1022 (D.C. Cir.) The Steelworkers filed their petition for review of the stay on September 20, 1982, in the Third Circuit. The action was later transferred to the D.C. Circuit and consolidated with another petition filed by the Steelworkers which raised the same issues. Several interested parties intervened--the Battery Council, United Auto Workers, Lead Industry Association RSR Corp., ASARCO, and the National Association of Recycling Industries. The parties and intervenors submitted briefs and oral argument was held on January 18, 1984. The parties then submitted supplemental memoranda. The parties are awaiting the Court's decision.

*****

Occupational Noise Exposure, Hearing Conservation Amendment (published 3/8/83).

Summary: This rule supplements the occupational noise standard and specifies elements of hearing conservation programs (such as requirements for monitoring employee noise exposure, annual audiometric testing for employees exposed above certain levels, and the guidelines for selection of hearing protectors).

Court Proceedings: Chocolate Mfrs. Assoc. v. OSHA, No. 81-1210 (4th Cir.). The CMA filed its petition for review on March 13, 1981. The case was later consolidated with another challenge to the noise standard filed by the U.S. Chamber of Commerce. The American Iron and Steel Institute and the Forging Industry Association intervened. The briefing schedule was held in abeyance pending the Secretary's rulemaking on hearing conservation amendments. Following promulgation of the hearing conservation amendment, both petitioners withdrew their petitions for review. The petitions for review having been withdrawn, the case is closed.

*****

Service Contract Act Recordkeeping and Reporting Requirements (published 10/27/83).

Summary: This rule provides a method to determine the prevailing wages for services purchased by the federal government.

Court Proceedings: The Department issued its final regulation on October 27, 1983. This rulemaking was challenged in a suit filed in the U.S. District Court for the District of Columbia (AFL-CIO, et. al. v. Donovan, et. al.). On Friday, January 27, 1984, the Department received a favorable decision from the district court, upholding in all respects the regulations. The regulations went into effect on the same day. They were originally scheduled to go into effect on December 27, but pursuant to agreement with the plaintiffs, the Department deferred the effective date until January 27. The Department has been advised that an appeal of the district court's decision was filed in the U.S. Court of Appeals for the District of Columbia on or about February 1, 1984.

*****

National Science Foundation

Nondiscrimination on the Basis of Handicap in Programs and Activities Benefitting from Federal Financial Assistance (published 3/1/82).

Summary: This rule implements section 504 of the Rehabilitation Act of 1974, 29 U.S.C. 794, providing for non-discrimination against handicapped persons. Institutions receiving NSF support will be required to consult with handicap organizations, prepare a self evaluation plan, and correct practices inconsistent with NSF's rules.

Court Proceedings: None

*****

Office of Management and Budget

Controlling Paperwork Burden on the Public (published 3/31/83).

Summary: This rule implements the provisions of the Paperwork Reduction Act of 1980 concerning collections of information and is designed both to "minimize the federal paperwork burden for individuals, small businesses, state and local governments, and other persons" and "to maximize the usefulness of information collected by the federal government."
Court Proceedings: None

*****

Small Business Administration

Small Business Investment Companies (published 9/30/83).

Summary: This rule revised and reorganized regulations governing small business investment companies.

Court Proceedings: None

*****

Department of Transportation

Delay of Implementation of First Phase of the "208 Standard" (Passive Restraints) (published 4/9/81).

Summary: This rule delayed implementation of NHTSA's 208 standard to allow time for rulemaking to consider rescinding the standard.

Court Proceedings: Center for Auto Safety Petition dismissed due to late filing (D.C. Circuit).

*****

Rescission of NHTSA's "208 Standard" (Passive Restraints) (published 10/29/81).

Summary: NHTSA rescinded a standard that would have required all new passenger cars to be equipped with an air bag or other passive restraint for occupant protection.

Court Proceeding: The rescission was declared arbitrary and capricious by both the Court of Appeals and the Supreme Court.

State Farm Mutual Automobile Insurance Co. v. DOT, 680 F.2d 206 (D.C. Cir. 1982); Motor Vehicle Manufacturers Association v. State Farm, 103 S.Ct. 2856 (1983).

*****

Suspension of NHTSA's "208 Standard" (Passive Restraints) (published 8/29/83).

Summary: NHTSA suspended the 208 standard in August 1983 to allow time for rulemaking in response to a Supreme Court decision finding the agency's prior rescission of the standard arbitrary and capricious.

Court Proceedings: None. The Supreme Court vacated NHTSA's rescission of the 208 standard in Motor Vehicle Manufacturers Association v. State Farm, 103 S.Ct. 2856 (1983). In response, NHTSA decided to conduct further rulemaking.

*****

Metropolitan Washington Airports Policy (published 11/27/81).

Summary: This amendment revoked portions of the rule issued September 15, 1980 regarding the following aspects of National Airport operations: the number and types of aircraft operations, operation and scheduling hours, passenger number limits, noise levels, nonstop service parameters, aircraft equipment restrictions, and hourly operation allocation among different user classes.

Court Proceedings: City of Houston v. FAA, 679, F.2d 1184 (5th Cir. 1982), the Court rejected a challenge to the validity of the 1000 mile perimeter rule (i.e. nonstop service parameters). ATA and several carriers also filed lawsuits, but these were withdrawn voluntarily after discussions with FAA.

*****

Nondiscrimination on the Basis of Handicap (published 7/20/81).

Summary: This interim final rule eliminated the mass transit accessibility requirements of Subpart L of 49 CFR Part 27. The rule required that federally-funded transit operators instead make "special efforts" to provide transportation services for the elderly and handicapped. Subsequently, section 317(c) of the STAA of 1982 required DOT to establish minimum service criteria for providing accessible transportation. DOT issued a proposal implementing section 317(c) on 9/8/83.

Court Proceedings: Paralyzed Veterans of America v. Smith, C.D. Calif. Civil No. CV-79-1979-WPG, challenged the interim DOT rule. A request for preliminary injunction was denied.

*****

Part 581 Bumper Standard (published 5/20/82).

Summary: This rule replaces the 5 mile-per-hour automobile bumper standard with a 2 1/2 mph standard.

Court Proceedings: Center for Auto Safety v. Steed, pending before the D.C. Circuit, Docket No. 82-1782. Oral argument was held 12/5/83.

*****

Minimum Levels of Financial Responsibility for Motor Carriers (published 6/11/81).

Summary: This rule established the minimum levels of financial responsibility required for motor carriers of property operating in interstate or foreign commerce, and for motor carriers transporting hazardous materials in intrastate or interstate commerce.

Court Proceedings: National Tank Truck Carriers v. Lewis, 550 F.Supp.113 (D.C.C. 1982). Case dismissed due to lack of standing.

*****

Railroad Power Brakes (published 8/23/82).

Summary: This rule revised FRA's power brake regulations by eliminating or modifying five sections of 49 CFR 232.

Court Proceedings: None

*****

Design Standards for Highways and for Resurfacing, Restoring, and Rehabilitating Streets and Highways (published 6/10/82).

Summary: These rules permit states to develop resurfacing, restoration, and rehabilitation criteria. They replaced an earlier policy statement concerning federal construction standards and exemption granting.

Court Proceedings: Center for Auto Safety v. FHWA, D.D.C. Civil No. 82-2824. Case settled (dismissed without prejudice) after the STAA of 1982 and an FHWA policy statement addressed the issue the Center had raised.

*****

Driver's Log (published 11/26/82).

Summary: The Driver's Log is a daily record of working hours kept by an estimated 565,000 truck and bus drivers. DOT's rule provided considerable flexibility in format, eliminated several data requirements, and limited the record retention period for both motor carriers and drivers.

Court Proceedings: None

*****

Buy America Requirements--Surface Transportation Assistance Act of 1982 (published 9/15/83).

Summary: This "Buy America" rule specifies the conditions under which U.S. produced steel, cement, and other manufactured goods must be used for a project financed with UMTA (mass transit) funds.

Court Proceedings: None

*****

Amendment of NHTSA's Safety Standard No. 108 to Require a Supplemental Stop Lamp (published 10/18/83).

Summary: This rule requires a high-mounted, third brake light on the rear of all new passenger cars.

Court Proceedings: None

*****

Department of Treasury

Interim Regulation Related to Handicap Discrimination under the Revenue Sharing Program (published 10/17/83).

Summary: These regulations implement the prohibition against handicap discrimination, as provided in section 504 of the Rehabilition Act of 1973, as amended (29 U.S. Code 794).

Section 504 was made applicable to the General Revenue Sharing program by its inclusion in the 1974 amendments to the Revenue Sharing Act.

Court Proceedings: Court order required the issuance of the final rule.

*****

U.S. Postal Service

Nine-Digit Zip Code Proposal (published 6/29/81).

Summary: This rule establishes an incentive for companies using the bulk rate mail program by allowing a discount for the use of a nine digit zip code.

Court Proceedings: None

*****

RESPONSES OF MR. DEMUTH TO QUESTIONS OF SENATOR GRASSLEY

QUESTION #1: **Can you comment on Senator Levin's assertion that we are giving the President a power over independent agencies (that he currently does not have) through our amendment?**

ANSWER: Generic joint-resolution regulatory oversight procedures similar to those proposed by Chairman Grassley or Senator Levin do not now exist as a matter of statute, either with respect to the so-called "independent" regulatory agencies or the more traditional Executive agencies. Obviously, if these procedures did exist, the granted "power" would not be new.

In other words, to the extent Congress enacts either the "Grassley" or the "Levin-Boren" joint-resolution oversight procedures, Congress would then be submitting joint resolutions, concerning the approval or disapproval of agency regulations, to the President for his approval or disapproval. The President does not now have this authority because the Congress has not enacted these generic regulatory oversight procedures.

On the other hand, the President was invested by the Constitution with the authority to approve or disapprove all joint resolutions. To the extent he approved or disapproved a joint resolution approving or disapproving a regulation issued by a so-called "independent" regulatory agency, he would not be exercising a new authority, but authority he has had--to sign or not sign a joint resolution--for nearly 200 years.

QUESTION #2: **When the Department of Justice submitted a statement on S. 1080 last September, Assistant Attorney General Jonathan Rose said:**

> **"Congress has frequently asked the agencies to make the basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. To the extent that agencies have misread the direction that Congress intended them to take, we believe that Congress--and not the courts--should be responsible for articulating regulatory policies."**

If the Department of Justice had argued this position before the Court, maybe we would not have had the Chadha decision to cope with. Is this statement still a reflection of the Reagan Administration's position on Congressional oversight? Do you agree that a resolution of approval is a responsible way to articulate regulatory policy?

ANSWER: As we testified earlier this month, there is clearly a need for both the President and the Congress to oversee the issuance of agency regulations. The President is the Chief Executive, charged with seeing to the execution of the laws. Congress creates those laws. The courts review the actions of each. Mutual oversight exists because the Congress, the President, and the Judiciary are both dependent upon and independent of one another, yet accountable to the public for the development, execution, and interpretation of regulatory laws. We also pointed out, however, that the Administration has yet to adopt a position on these proposals for generic regulatory oversight. We are reviewing what we would consider to be the best approach, and will transmit our views as soon as we can.

Senator SPECTER. Mr. Chairman, I wonder if I might ask one question, because I have other commitments. I would like Mr. DeMuth's evaluation, knowledgeable as he is about the congressional capacity, concerning how we may realistically deal with these kinds of issues.

You tick off the issue of pollutants or banning products. We had extensive debate on the so-called lemon rule about used cars last year. The access charges have been before us and we have deferred to the commission on that. We had extensive debate in the Appropriations Committee last year on the syndication, the battle between the movie industry and the television industries.

Last year in the 1st session of the 98th Congress we voted on about 500 bills. In the 97th Congress, Congressman Grassley and I joined forces in the Senate. We voted about 900 times.

What is the capacity of the Congress to come to grips with these issues? Here we have a very important procedural rule on legislative veto. Senator Grassley has scheduled hearings. I come because of my deep interest in the subject, but also to give support to the subcommittee. Most subcommittees in this Congress or at least on the Senate side are one-man shows.

The chairman runs it and there is just so little time. With the death penalty bill which is now on the floor of the Senate, with a Veterans Committee that I have at 2 o'clock, and Mr. Regan and Mr. Stockman and Mr. Feldstein are coming in at 1:30, to say nothing of so many other matters, is it realistic that the Congress can get into these issues and really exercise oversight through the legislative veto?

Mr. DEMUTH. Sir, I did not—I hope I did not give the impression that I think I am any kind of an expert on congressional capacity. I simply wanted to make the point that the volume of regulatory activity is very high.

I take the import of your question to be that Congress already spends a good deal of its time overseeing the decisions of both the independent and the executive regulatory agencies, and that a strong argument for the regulatory veto proposal put forth by Chairman Grassley and yourself is that it would make the process more formal and on-the-record. And I think that that is indeed a very strong argument.

I simply wish to note that we review over 1,500 final rules in the course of an average year under the President's Executive order.

Senator SPECTER. 1,500 rules?

Mr. DEMUTH. 1,500. I think that the approach that Chairman Grassley and Mr. Lott in the House have taken, to try to make the process more manageable by major rules, has some promise.

You will see in the document we are preparing for you that in calendar years 1981 and 1982 and 1983 there was a total of about 128 rulemakings that would be defined as major rules. That is 43 a year. Congress already passes hundreds of laws in a year, and many of them are influenced by Congress' views on current rulemakings in the executive branch implementing earlier enactments on budgetary or economic or environmental issues.

So I am simply noting the issue. I am an agnostic on how manageable one or another regulatory veto procedure would be for the Congress.

Senator SPECTER. What is an agnostic in this context?

Mr. DEMUTH. I do not have an opinion on it one way or the other.

Senator SPECTER. Is that what an agnostic is? A witness with no opinion.

Mr. DEMUTH. I see a lot of rules coming through OMB, and they take a lot of time to review and understand. Reviewing a large number of them certainly require some adjustments in the ways Congress operates, certainly under the Grassley proposal.

Senator SPECTER. It might require limiting the unlimited debate rule of the world's greatest deliberative body.

Mr. DEMUTH. But on the other hand, in many ways it might simply change the nature of Congress' attention. I certainly read a lot of rules in my job at OMB, and I lay them next to the Congress' statutes and the President's Executive order. And after having done this for a couple of years, I am very sympathetic with the general proposition that Congress ought to be spending more time than it does now looking at some of these rules and deciding whether they really make sense in terms of the statutory goals and current congressional opinion.

Mr. SMITH. Could I respond to your question, Senator? I think the question is really to be answered not with an empirical answer but with a judgment decision that Congress really has to make, and I think there is some room for manageable control in the amendment that Senator Grassley has submitted, that it is possible for the Congress. But Congress has to make that decision.

The thing, that has given the Administrative Conference pause in discussing legislative veto is the fact that a number of the appropriations bills over the last several years have not been finally passed by the Congress, and those clearly are as central to Congress' responsibilities as any other law that Congress passes.

But I think it is a judgmental decision and I think it is a question of values.

Senator SPECTER. Thank you very much. Thank you, Mr. Chairman.

Senator GRASSLEY. I would like to comment on the possibility of the most deliberative body perhaps never reaching a decision; our legislation does provide for expedited procedures so that we would not have that problem. One person could not hold up the issue. And I want to thank you, for your kind support.

Senator SPECTER. Thank you very much, Mr. Chairman.

Senator GRASSLEY. Mr. Smith, would you proceed.

STATEMENT OF LOREN A. SMITH

Mr. SMITH. Senator Grassley, thank you very much for the opportunity to appear before this committee. The Administrative Conference is a body that advises both the Congress and the President and we hope our advice and expertise has been useful to this committee in the past.

Let me say before going on with my remarks that I find the statements that my colleague has made totally in accord with what I think is a realistic view of the process and would identify myself with virtually everything he said. In fact, I would go further than that and note that the job that he has done—and his predecessor, Jim Miller—I think is making a very significant and innovative contribution to the process of controlling the regulatory system. The efforts of the Office of Regulatory Policy at OMB have been salutary and have improved the administrative system.

Let me note with respect to the amendment to S. 1080 under consideration two general observations before proceeding with a few specific comments. I will not read my testimony but will just take a few points from that and highlight them.

It seems to me that, as I noted in September when I testified before this committee before, that the concern over the issue of legislative veto is an important concern in light of the decision by the Supreme Court in *INS* v. *Chadha.* But it should be kept in mind at all times that the concern over legislative veto, both by the Congress and by the public at large, is a symptom. It is a symptom of a malaise in the political system, a view that is held by many of the people in this country, including students of government and economists, that our regulatory system has gotten too complex, has become too burdensome on the functioning of a free society.

I think there is evidence to support that view, and I think in dealing with solutions to that view, like the legislative veto, we should always keep in mind that we are dealing with a broader problem than merely one form of legislative oversight. Improved oversight of the regulatory system ultimately will not solve the problem of a government that, in my view at least, is too large and seems to be having effects that were unintended by the representatives who passed the laws and the individuals who voted for those representatives, the electorate.

Second, I would note one systemic observation, and that is the genius of the American constitutional system is its tripartite structure. That tripartite structure is based upon a notion of checks and balances, and that is a very important element of the framers 'concern for setting up our constitutional system. But there is another aspect of that tripartite structure which the framers also clearly saw, and that is that separation of functions makes government work. The executive was not idly chosen as a single individual. There were proposals at the constitutional convention for a many headed executive, but ultimately was believed that one President could best administer, could best execute the laws, that the administration needed a single head.

Likewise, the Congress was structured, and was thought out to be, the policy making body that provides general direction, but not the administrative arm. In fact, the framers—there is evidence—strongly rejected the English parliamentary system where Parliament really was not only the legislative branch, but really the ultimate executive of the nation.

Likewise, the view of the courts was a view limited to the judicial branch judging. In the Federalist Papers it was very clearly perceived as a danger that if the courts engage in functions beyond merely judging, beyond merely being the arbiters of the constitutional and legal system, grief would result.

I think one of the aspect of the malaise I have referred to previously was we have gotten some of these distinctions confused. I think in any reforms of the system we should keep that central principle that the framers imprinted on our system in the constitution clearly in mind. We should try to keep executive functions in the hands of the executive branch, legislative functions in the hands of the Congress, and judicial functions limited to the courts.

The Administrative Conference, as I noted, has criticized the legislative veto in the past. One recommendation of the Administrative Conference was that Congress should not enact a legislative veto provision. That was prior to *Chadha*, but was not based on constitutional grounds; it was based upon the functional concern that Congress could not fulfill its responsibility, one, of dealing with the myriad of regulatory policy matters; and, two, it was based upon a concern that as part of this system we have developed we passed the Administrative Procedure Act in 1947 with the idea of insulating the regulatory process from the political process.

Congress does things in different ways than courts, and courts do things in different ways than the executive branch. We have tried to work out a compromise in the regulatory process through the devices of rulemaking and adjudication to ensure the due process rights of individuals while ensuring that the process can move forward with some expedition. That, I think, is a concern in any act of any legislative veto statute. I think, Senator Grassley, your proposal, your amendment to S. 1080, considerably moves in the direction of resolving some of those concerns that the Administrative Conference had.

I speak as an individual, as the Chairman of the Administrative Conference, as an appointee of the President, and as a member of the administration. I do not speak on behalf of the Conference, which is a body that is part independent and part executive branch and part public. But I think my views are consistent with what the Conference has said on these subjects.

The proposed amendment establishes expedited procedures for the disapproval of rules other than major rules by joint resolution. In this regard it resembles S. 1650, discussed in my September testimony. Unlike 1650, however, the proposed amendment provides a firm 90-day report and wait period which cannot be extended by the action of a single committee or a single house. I believe this is more consistent with the Supreme Court's decision in *Chadha*. It seems to me that this is clearly constitutional.

However, I have some concern about the ability to change that period to 75 days when a disapproval resolution is rejected by either House of Congress. It seems to me that raises questions under *Chadha*. And I would recommend in the interests of caution that if the committee and the Congress feel that that is an appropriate change, that that provision should be severable in case of judicial disapproval of this particular section of your amendment.

Second, one of the criticisms of the conference, as I noted before, was the work overload of the Congress. I think that the limitation of the approval mechanism to major rules deals adequately with that problem. The 40 to 50 major rules that will have to be dealt with, that come forward from the regulatory bureaucracies, provide a manageable amount of work for the Congress. Also, I think that the system that we operate under requires regularization. It requires procedures. The very nature of our government is really procedural regularity. Therefore, I think it is important that one of the merits of your amendment is to provide a regularized mechanism for legislative oversight of the rulemaking process.

I think one of the criticisms of the Supreme Court's decision in *Chadha* was that it was not really changing any existing process in government. What it was doing was forcing legislative vetoes into the appropriations process and into informal contacts between committees and the agencies and that was not a good thing. I think the regularized procedure in your bill, the regularized scheme of legislative oversight, is a very positive change.

Third, I would note that another positive advantage of the amendment you have proposed is to allow agencies some flexibility through the emergency rule provisions, which allow a rule to go into effect for, I believe, 120 days prior to its meeting the requirements of the bill. I think that is an adequate emergency approval time, subject however to any specific areas that at this time may be brought to the attention of the committee.

My fourth specific comment relates to a problem that has been raised, I believe, by Congressman Broyhill, and that is the question of judicial review and the kind of scrutiny that will be given to major rules that are affirmatively approved by the Congress.

There is a concern, I think, that has been expressed by members of your staff and by other individuals that this would alter in a fundamental way the process by which rules are reviewed today. Today there are really two aspects, or two broad categories, of judicial review of rules. One is to determine whether they are consistent with the statutory scheme and whether they are within the authority that the statute has delegated to the Federal agency. And, second, there are a number of procedural controls that the courts look to, whether the action by the agency has complied with the provisions of the Administrative Procedure Act and whether the rules are arbitrary and capricious.

It seems there is a danger in the positive approval of major rules, and I think it is a danger that cannot be dealt with very easily. I think Congressman Broyhill's position in general was correct, but it seems to me it would be very difficult for the court to totally ignore the fact that a major rule was affirmatively approved by both Houses of the Congress and signed by the President.

That is inevitably going to give some additional weight to major rules that go through such approval if your amendment is adopted. One suggestion that I have, and this is not incorporated in my testimony, but it is consistent with the direction Congressman Broyhill was going at, would be to phrase the resolution of approval in the form of authorizing an agency to promulgate the rule rather than approving the rule itself.

That might well limit the impact of this provision on judicial review.

Finally, a fifth specific point that I will make is with the question that has been raised with respect to amendments of rules. Of course, under the Administrative Procedure Act, an amendment to a rule is a rule, and an amendment to a rule can either be a major rule itself or a minor rule. And that does not depend on whether the underlying rule is a major or minor rule.

A minor rule may be amended to give it much greater economic impact, or a major rule may be amended in a rather small and insignificant way.

It seems to me it should be made clear in the amendment that you propose that an agency can always amend its rules. The amendment again will be a separate rule and will come before the process in the same way that an original rule would have.

Thank you very much for this opportunity, Senator, and I hope that the Conference has been of help. We will continue to try to be of help to your committee and your staff.

[Material submitted for the record follows:]

PREPARED STATEMENT OF LOREN A. SMITH

Mr. Chairman and Members of the Committee:

I am Loren A. Smith, Chairman of the Administrative Conference of the United States. I am grateful for the opportunity to testify again on S. 1080, the Regulatory Reform Act. With me here today are, on my right, Stephen Babcock, the Executive Director of the Conference, and, on my left, our General Counsel Richard Berg. The focus of today's proceedings is on an amendment to S. 1080—introduced by you, Mr. Chairman, and several of your distinguished colleagues—that would replace the concurrent resolution veto provision now in the bill with a new, joint resolution legislative review procedure.

Let me say, at the outset, that I wholeheartedly agree with you that under our Constitution, it is the Congress that must write the laws of the land. Though the Administrative Conference some time ago criticized the legislative veto on practicability grounds, and thus did not favor its general use, it is fair to say that the Conference does believe strongly that administrative agencies should not be allowed to exercise their rulemaking powers unchecked. Agencies are the creatures of Congress, and they must be accountable both to the Congress, the author of our laws, and the President, who executes those laws. Therefore, I believe these hearings—and other efforts to reexamine the distribution of power in the Federal Government—are very timely and worthwhile.

Several months ago I had the pleasure of testifying before this subcommittee on S. 1080, and I then addressed the concurrent resolution legislative veto provision in the bill. I also reviewed the Conference's previous work and action in this area. I will not burden the record of today's proceedings by restating that earlier testimony. However, I would like to briefly describe what the Conference has since done in this area.

On December 15, 1983, the Administrative Conference met in plenary session, and the first item on the agenda was a presentation and debate on legislative review alternatives in the wake of the Supreme Court's decision in INS v. Chadha. Professor L. Harold Levinson, a Vanderbilt University law professor, submitted a paper in connection with that presentation, and it is appropriately titled Congressional Oversight of Agency Rulemaking: Options Available After Chadha (Dec. 1, 1983). Professor Levinson, I should note, is a recognized authority on administrative procedure at the state level, and especially on state legislative and executive oversight procedures. Thus, he brought a fresh, and perhaps unique perspective to bear on the issues. I have submitted several copies of his paper along with my testimony today.

I think the Conference's December 15th debate of the problem of Congressional review of agency rulemaking will be a contribution to the larger effort to develop an appropriate response to the Supreme Court's striking down of the legislative veto. The transcript of that debate is currently being edited, and as soon as that process is completed, I will send each of you a copy.

I now turn to the amendment to S. 1080 that is being considered today. The amendment would replace the concurrent resolution of disapproval procedure in section 13 of S. 1080 with provisions for joint Congressional resolutions of approval or disapproval of agency rules. Because the joint resolution procedure includes a vote in each House of Congress and presentment to the President, there is no doubt about its constitutionality. The proposed amendment is essentially the same as Chapter 8 of H.R. 3939, the Regulatory Oversight and Control Act of 1983, which was introduced in the House of Representatives by Congressman Trent Lott, and others, on September 20, 1983.

The proposed amendment establishes expedited procedures for the disapproval of rules other than "major" rules by joint resolution. In this regard it resembles S. 1650, discussed in my September testimony. Unlike S. 1650, the proposed amendment provides a firm 90-day report-and-wait period which cannot be extended by the action of a single committee or a single House. (However, that period may be shortened; a rule would take effect if a disapproval resolution is rejected by either House or at the end of seventy-five days if neither House has acted.) The fixed report-and-wait requirement is an improvement over the provisions of S. 1650. It appears to be more consistent with the Chadha decision, and it reduces the uncertainty as to when a rule takes effect.

The major innovative feature of the proposed amendment is the provision that major rules may not go into effect until approved by joint resolution. Expedited procedures are provided for the consideration of such resolutions, but the availability of the procedures ends if the resolution is not passed within ninety days. The rule is not subject to amendment under the provisions of the amendment.

In my September testimony, I expressed concern that Congress should avoid involvement in the routine details of management and administration. By limiting itself to major rules, the proposed amendment attempts to do that. Whether or not requiring positive enactment of this limited body of rules—currently numbering 40 or 50 rules per year—will create too heavy a workload for the Congress is something that only Congress, and perhaps only future experience, can determine.

The Conference certainly has no objection to increased legislative activity on the part of Congress. And I, personally, would be delighted to see greater involvement of Congress in policymaking that affects the citizens of this nation. Also, a regularized scheme of oversight may be preferable to the occasional use of devices such as committee oversight hearings and appropriations riders. (In this regard, I note that section 302 of H.R. 3939 provides that appropriations limitations on rule implementation shall be in order only with regard to non-major rules and only when a resolution of disapproval has not been considered by the House or has been passed by the House but has not been enacted.)

The proposed amendment to S. 1080 provides for a certain measure of agency flexibility by permitting emergency rules to go into effect for a period of not more than 210 days without going through the new procedures provided by the bill. This will prevent regulatory voids which could be harmful in vital health or safety situations or be disruptive of on-going governmental programs.

The judicial review provisions of the proposed amendment are also worthy of note. As with S. 1080 as it now stands, the amendment provides that reviewing courts should not consider Congressional inaction on or rejection of a joint resolution of disapproval of a non-major rule as evidence of approval of the rule. As I observed in my earlier testimony (when commenting on a provision of S. 1650), such a provision will forestall the possibility of reviewing courts giving an undue presumption of validity to a rule that Congress failed to disapprove.

Interestingly, the proposed amendment goes on to provide that enactment by the Congress of a joint resolution of approval of a major rule "shall not be construed to create any presumption of validity with respect to such rule, and shall not affect the judicial review of the rule under [the Administrative Procedure Act]." It is doubtful that this provision can cause the courts to ignore the express Congressional approval of a rule, considering that such approval with presentment to the President is constitutionally equivalent to legislation. I suggest that if Congress decides to require positive Congressional endorsement of major agency rules, it should be willing to limit subsequent judicial review to constitutional issues and possibly assertions of inconsistency with the organic statute.

Another question raised by the provision for approval by joint resolution is that of the agency's authority to make subsequent amendments in the rule. I presume that it is intended that the agency will be free to amend the rule just as if it had not been ratified by Congress, but this should be made specific one way or the other.

I hope these preliminary thoughts will be of use to the Subcommittee. Obviously, the full Conference has not had an opportunity to discuss the provisions of the proposed amendment to S. 1080. Nevertheless, I believe that my own evaluation is relatively consistent with positions taken by the Conference in the past.

This concludes my testimony. I will be glad to answer any questions that you may have.

Senator **GRASSLEY**. Mr. Smith, I was hoping for an opportunity for an exchange of questions, but because of time I will have to submit them in writing, and I will have my staff give those to you right now so that we can expedite the process.

[Subsequent to the hearing, the subcommittee received the following material:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, DC, February 15, 1984.

Hon. CHARLES E. GRASSLEY,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I want to thank you for the opportunity to testify last week on your proposed amendment to S. 1080, the Regulatory Reform Act. You presented me with several questions at the end of my testimony. The questions and my answers are set forth below.

1. *Question:* With regard to judicial review of rules which have gone into effect following a joint resolution of approval by Congress, you ask: "Isn't it possible to make clear that the approval merely authorizes the rule to go into effect, but expresses no opinion on whether the agency followed all appropriate procedures or complied with their statutory authorizations and deadlines? The rule could then be challenged exactly as now, and the standards for judicial review contained in S. 1080 would still apply."

Answer: In my testimony, I stated that "[i]t is doubtful that [such a] provision can cause the courts to ignore the express Congressional approval of a rule, considering that such approval with presentment to the President is constitutionally equivalent to legislation." I believe, upon reflection, that this rather broad statement requires clarification.

If the joint resolution of approval is phrased so as to *allow* the agency's rule to go into effect (that is, no attempt is made by Congress to write the rule into legislation), then a reviewing court is likely to show less deference to the rule than it would to a statute. I believe I suggested in my testimony that section 808(b) of the proposed amendment be revised to replace the world "approved" with a phrase such as "authorizing an agency to promulgate" a major rule.

On the other hand, I do believe the fact of a joint resolution of approval, with presentment to the President, is bound to affect judicial review of the rule. For example, I think a claim that the rule exceeds the agency's delegated authority will be much harder to make before a reviewing court. After all, the court cannot ignore the fact that Congress expressly approved the implementation of the specific rule.

Another factor to take into account is that a reviewing court cannot overlook the practical consequences of striking down such a rule. It is not unusual, where a court is dissatisfied with some aspect of the agency's consideration of the rule, to remand the rule for limited purposes. See *e.g., Industrial Union Dept. v. Hodgson,* 499 F.2d 467, 488 (D.C. Cir. 1974). The social cost perceived in doing so is modest since the rule, in most cases, has not gone into effect, and the agency can remedy the problem with little additional investment of time and resources. Some courts have even spoken of courts and agencies as "partners" in a unitary rulemaking process. See, *e.g., Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 848-9 (D.C. Cir. 1972); *Industrial Union Dept. v. Hodgson, supra* at 469. If, however, the consequence of striking down the rule is to subject it again to the need for affirmative Congressional action, the courts will be more likely to uphold the rule in close cases.

A related point is that courts frequently find defects in only part of a complex agency rule, and only the defective part is remanded to the agency for further proceedings. See, *e.g., Small Refiner Lead Task Force v. EPA*, 705 F.2d 506, 551 (D.C. Cir. 1983) (striking down one element of EPA's definition of "small refinery" because of inadequate notice to the public). Again, reviewing courts may, in close cases, be reluctant to remand parts of rules if that means any agency revisions to the rules must be submitted to the Congress for review.

Indeed, the joint resolution mechanism raises interesting questions of severability. If parts of a major rule are struck down on judicial review, may the agency leave the rest of the rule in effect without further Congressional action? Would this depend on the agency or the court's determining that Congress would have approved the rule in that form?

In summary, though one can only speculate about the effects on judicial review of joint resolutions of approval or disapproval by Congress, I think it is unrealistic to expect that the Congressional procedure will not influence review of the rule. However, a provision such as section 808 of the proposed amendment will encourage courts not to treat review of the agency rule as it would review of a statute. Courts may still take a hard look at the factual basis of rules, and the rulemaking procedures employed by the agency, and strike down rules when defects are found.

2. *Question:* I fail to see why approval by joint resolution has any effect on an agency's authority to make amendments to a rule, as you raised the question in your statement. Any agency that proposes to amend a rule now must go through the notice-and-comment and other rulemaking procedures, and the same should be true if the original rule has been approved by joint resolution. It does seem likely that an amendment would not often be enough of a change in the status quo to qualify as a major rule, under the $100 million impact test, and would therefore be subject to a resolution of disapproval rather than the full consideration of approval by both Houses of Congress. Do you see an big problems with this?

Answer: I do not see a big problem with subsequent agency amendment of a major rule, provided that the joint resolution of approval is phrased in terms of allowing the agency to put the rule into effect. Problems would only arise if the joint resolution were phrased to make it appear that Congress was adopting or incorporating the agency rule into legislation. In that case, it would be helpful to include language making clear that the agency has authority to amend the rule.

3. *Question:* Do you see a constitutional question in allowing a rule to go into effect after 75 days if the Congressional review procedure indicates that the approval/disapproval process is substantially complete? Please explain how you would correct this problem.

Answer: In my testimony I commented on section 803(b)(2)(B) of the proposed amendment which would allow a non-major rule to go into effect in less than 90 days if, after 75 days of continuous session of Congress, neither House of Congress has completed action on a resolution of disapproval. Stated another way, the provision establishes a 75-day report and wait requirement, which either House could extend to 90 days by approving a resolution of disapproval of the rule.

I understanding that some lawyers would read the *Chadha* rule very strictly as disapproving any device whereby action or inaction by one or both Houses of Congress can cut short or extend Executive authority. For myself I would be inclined to allow the machinery of government "a little play in its joints," *Bain Peanut Co.* v. *Pinson*, 282 U.S. 499, 501 (1931). However, to be on the safe side I recommend substituting a single, fixed-term report and wait requirement or, alternatively, making it clear that if the provision cutting the 90-day period to 75 days is held unconstitutional, the rest of the provisions would stand.

I hope these answers satisfactorily respond to your questions. If they do not, I will be happy to provide you with additional views.

Sincerely yours,

Loren A. Smith,
Chairman.

Senator **Grassley**. I would like to note before you go, Mr. DeMuth, that I appreciate the fact that the administration could not give a view at this point. I am also glad to note that you are going to continue to take a look at it and it would be my hope that maybe before something happens on the Senate floor the administration would have a view. But I do appreciate the fact they are taking a very close look at the proposal. Thanks to both of you.

I would now like to call our last panel and introduce Sally Douglas. She is representing the National Federation of Independent Business. We have Jeff Perlman, who will be taking the place of Richard Leighton, speaking for the U.S. Chamber of Commerce; Dick Patterson, chairman of the National Association of Manufacturers Subcommittee on Regulatory Reform; and Cornelius Kennedy, who is currently in the practice of law in Washington, DC.

You have all appeared before this subcommittee before. I welcome you back and ask you to proceed according to the way that I introduced you.

STATEMENT OF SALLY L. DOUGLAS, MANAGER OF RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; JEFF PERLMAN, COUNCIL ON ADMINISTRATIVE LAW, U.S. CHAMBER OF COMMERCE; DICK PATTERSON, CHAIRMAN, REGULATORY REFORM SUBCOMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS; AND CORNELIUS KENNEDY, ATTORNEY AT LAW, WASHINGTON, DC

Ms. DOUGLAS. Thank you, Mr. Chairman. I will be brief. As a result of the *Chadha* decision, you have been faced with the task of drafting an alternative to the traditional legislative veto mechanism, and you have asked that we comment on your proposal. I am happy to do so, not as a legal expert, but as the representative for 560,000 businesses that must contend with the vast array of regulations that hit them on a daily basis.

As we stated many times before in previous testimony, small businesses support the legislative veto because they see it as a means to assure accountability. Legislative veto is believed by our members to be the simplest, most direct way to shift real power from the Federal agencies back to the Congress where it belongs, where elected representatives of the people can make sure that regulations do not go beyond the intent of the laws Congress passed in the first place. Therefore, the veto must assure that the final responsibility and accountability for the actions taken under the delegated authority rest with the elected representatives of the people. Your proposal would do just that, in our opinion. It establishes the use of a joint resolution of disapproval for nonmajor rules and a joint resolution of approval for major rules. We believe this is the most effective way to reestablish congressional control and congressional accountability.

Only through the approval mechanism can Congress have the control it had under a one-house veto, the control that is necessary over major regulations. For only under the approval approach is Congress assured of having the final say over whether or not a rule or regulation takes effect. The disapproval mechanism does provide some control, but that control may often require a two-thirds vote by the Members of both Houses to be successful in halting a rule. The potential need for overriding the Presidential veto tilts the balance of control in favor of the executive branch, which has the responsibility of presenting the rule. NFIB strongly believes that clearer congressional authority is necessary for major regulations.

I will submit the rest of my written testimony for the record.

Senator **Grassley**. Thank you.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SALLY L. DOUGLAS

Mr. Chairman, NFIB, on behalf of its more than 560,000 small and independent business members, appreciates the opportunity to testify on your legislative veto amendment to S.1080, the Regulatory Reform Act, providing an alternative to the traditional legislative veto for regulations. We commend you, Mr. Chairman, for holding a second hearing on legislative veto.

The NFIB supports the thrust and concept of S.1080, the Regulatory Reform Act, as introduced by the Chairman of this Subcommittee and Senator Howell Heflin. Today's hearing before this Subcommittee will consider the legislative veto alternative amendment No. 2655 to S.1080 as published in the November 18 issue of the Congressional Record.[1] Mr. Chairman, the support for legislative veto has been widespread in the public at large, and particularly in the small business community. In September 1978, the NFIB asked its members, "Do you favor or oppose Congressional review of regulations?" Members' responses were 76% in favor, 21% opposed, and 3% undecided. As further evidence of that support, legislative veto was Recommendation No. 41 of the White House Conference on Small Business in 1980, and legislative veto was recommended by a thirty association task force on small business issues in January 1982. President Reagan indicated his support for legislative veto on October 8, 1980, in Youngstown, Ohio, during his campaign for the Presidency.

As we have stated in previous testimony, small business owners believe that a tool such as legislative veto provides an avenue for appeal which does not now exist. Large corporations with their teams of lawyers, statisticians and computers are able to work directly with regulatory agencies or even go to court to challenge unfair or inequitable regulations. The small business owner cannot afford the time or the resources, being overburdened with work and frequently understaffed. A small business owner cannot afford the legal expertise of an administrative lawyer who would be able to protect him from devastating regulatory mistakes.

---

[1] 129 Congressional Record S17081 (daily ed. Nov. 18, 1983) (statement of Sen. Grassley).

The NFIB has supported legislation advocating the reform of regulatory procedures to give Congress the power to reject any rule or regulation that goes beyond the original intent of the law. The establishment of a legislative veto mechanism provides a significant shift in the real power of government away from the bureaucracy and back to the elected Congress. Legislative veto makes it clear that, insofar as public policy and lawmaking are concerned, the agencies are the agents and creatures of Congress, not its masters or even its equals.

Too often in the past, agencies were given a free hand in determining what methods to use in implementing the laws passed by Congress. The NFIB believes very strongly that, just as Congress should not abrogate its legislative rights and responsibilities, neither should it dodge its responsibility to ensure that the intent of a law is carried out in the most effective and least burdensome manner possible.

With legislative veto, the small business owner could take his case directly to his senators or representative. Congress would be able to correct regulatory excesses and scrutinize both the regulating process in general and an agency's parameters in particular. Thus, small business considers such legislative veto proposals to be among the simplest and most direct methods of introducing accountability to the federal regulatory structures and enhancing Congressional responsiveness to the public's demands for sensible government.

Legislative veto would not be used as a means by which Congress could interfere in the legitimate business of the Executive Branch. Congress could maintain control over what was the legitimate responsibility of the Congress--the making of the laws of this country. Legislative veto assures that the final responsibility and accountability for the actions taken under the delegated authority rested with the elected representatives of the people.

On June 23, 1983, the Supreme Court in INS v. Chadha declared unconstitutional a one-House legislative veto that Congress had reserved to itself to disapprove immigration decisions by the Attorney General. The Supreme Court's ruling was far reaching--it appeared to invalidate every form of legislative veto (one-House, two-House, and committee). The Chadha decision was reinforced on July 6, 1983, when the Court affirmed two lower court holdings that had struck down a two-House veto of a Federal Trade Commission regulation (Consumers Union, Inc. v. FTC) and a one-House veto directed against a Federal Energy Regulatory Commission rule (Consumer Energy Council of America v. FERC).[2]

Except for specific exceptions noted in the Constitution concerning impeachment cases, approval or disapproval of Presidential appointments, and the ratification of treaties negotiated by the President, the Supreme Court held in Chadha that the framers of the Constitution had "narrowly and precisely defined" that all legislative actions must be presented to the President before becoming law. Chief Justice Warren Burger stated in the majority opinion that Article I of the Constitution dictated that "every Order, Resolution, or Vote"--any legislative act--by Congress is subject to the President's approval. The Chadha decision explicitly extended that principle to legislative vetoes of federal rulemaking agencies, even though those agencies customarily issue their rules without the President's concurrence.

---

[2] See Consumers Union Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc), aff'd, 103 S. Ct. 3556 (1983) and Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd, 103 S. Ct. 3556 (1983).

By denying Congress the use of the legislative veto mechanism, Justice Byron R. White argued that the Supreme Court presented Congress with an unhappy choice--

> either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specifics to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies. To choose the former, leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[3]

Justice Byron R. White's dissenting opinion in Chadha labeled legislative veto as "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[4] With the legislative veto invalidated, Justice White astutely observed that the independent agencies had "become a veritable fourth branch of the Government, which has deranged our three-branch legal theories"[5] and was not subject to the direct control of either Congress or the Executive Branch.

At the heart of the issue of legislative veto of administrative rules and regulations is the question: Who makes the laws in this country--the elected representatives of the people or the unelected bureaucrats? During a two year period, Congress enacts approximately 500 laws, while the fourth branch of government--our bureaucrats--

---

[3] IRS v. Chadha, No. 80-1832 slip op. at 2 (U.S. June 23, 1983 (White, J., dissenting).

[4] Id. at 7.

[5] Id. at 19-20.

issue about 10,000 regulations. Clearly, the unelected bureaucrats are running our lives and are unanswerable to us.

In view of Chadha, Congress must draft legislation more carefully and spell out its intent more clearly. Even if Congress were to be particularly precise in telling agencies what regulations to write, there would remain the major challenge of ensuring that those regulations are written fairly and carefully. The Administrative Procedure Act (APA) has dictated agency practice for over three decades and has brought a modicum of consistency to the regulatory process. However, as the federal regulatory presence has become more pervasive, it is clear that the APA protections are no longer adequate to ensure that the regulatory process works smoothly and carefully.

Senate Bill 1080, as passed by the Senate in the 97th Congress and reintroduced on April 19, 1983, contained a traditional legislative veto for regulations. The legislative veto alternative amendment, which is at issue here today, would replace the unconstitutional concurrent resolution of disapproval with a joint resolution of approval for major agency rules, and a joint resolution of disapproval for all other (non-major) rules. The approval/disapproval combination for major and non-major rules, according to Representative Elliott H. Levitas, one of Congress' most fervent defenders of legislative veto, will:

> provide for true veto control by the Congress in requiring affirmative action on the most significant regulations issued by the agencies, that is, rules with an economic impact of over $100 million per year; but this procedure would not unnecessarily burden the Congress or delay rulemaking which is more routine and less significant.[6]

Congressman Trent Lott's regulatory reform bill, H.R. 3939, incorporates the approval and disapproval mechanisms.

---

[6] U.S. Congress, House, Committee on Rules, 98th Cong., 1st Sess., Testimony of Rep. Levitas, Nov. 10, 1983, p. 9.

The legislative veto alternative amendment requires that most rules of a general applicability are to be submitted to Congress for a 90-day review period (calendar days of continuous session, excluding those during which either House is not in session for more than three days, and days during which a resolution is pending before the President). Rules are referred to the committee of primary jurisdiction or to a special ad hoc committee appointed by the presiding officer of the respective House if there is more than one standing committee involved. The tight time frame precludes joint or sequential referral.

By separating the rules between major rules and non-major rules for congressional scrutiny, this proposal allows Congress to retain effective control over regulatory actions and fulfill its constitutional role of legislation by a majority of the elected representatives of the people. Under the proposed "report and wait" mechanism, Congress is permitted to review those reported non-major rules and regulations and act to disapprove them through the enactment of a joint resolution.

Under the Chairman's proposal, major rules will not take effect unless a joint resolution of approval is passed approving the proposed-rule within the 90-day review period. The resolution would be introduced by the committee chairman or a member designated by that chairman immediately upon refusal of the proposed rule. An agency could not propose the same rule for two years, but would be allowed to offer an amended version which reflected the congressional debate and consideration at the time of the original rule's consideration. That version would also be subject to the review process.

All other non-major rules would follow the same referral procedure; however, they would also be subject to a joint resolution of disapproval which may be introduced by any Member. Such a rule may take effect after 75 days if neither House has completed action on such a resolution, or if either House has rejected a resolution of disapproval. This proposal also covers emergency rules, providing that those rules shall take effect immediately but are limited to 120 days unless the Congressional review procedures have been initiated.

The legislative veto alternative amendment contains expedited procedures for both approval and disapproval resolutions. In the case of major rule resolutions, which will require enactment if the regulations are to take effect, the introduction of approval resolutions is mandatory, as is reporting by the committees of jurisdiction within 45 days. Prior to the 45-day deadline, the appropriate committee would review the major rule and provide recommendations of the committee as to whether the resolution should be adopted or rejected.

If a disapproval resolution for a non-major rule is not reported by a committee within 30 days after the rule's referral, it shall be in order to discharge the committee of its consideration. In the case of a resolution referred from the other House, the Subcommittee Chairman's amendment states that the discharge motion is in order 20 days after the resolution's referral. Any motion to discharge must be supported in writing by one-fourth of the Members of the House involved. The motion is highly privileged and subject to one hour of debate divided between proponents and opponents in the House, and the majority and minority leaders in the Senate.

Expedited procedures, as covered under this amendment, assure that the decision whether or not to disapprove regulations is not made by a handful of committee members but is made by the full House. Without expedited procedures, a committee chairman could prevent full consideration of the disapproval measure and fail to report the resolution until after the "wait" period had expired. Any reported resolution must be accompanied by a committee report "which includes the text of the rule, the agency's explanation of the rule and the committee's reasons for recommending the adoption or rejection of the appropriate resolution."[7]

Once the approval or disapproval resolution has been reported or discharged, a motion to proceed to floor consideration shall then be in order. Floor debate shall be limited to not more than two hours, equally divided between proponents and opponents in the House, and the majority and minority leaders in the Senate. If a House has not adopted a resolution of its own before 75 days have elapsed after the rule's submission, the amendment states that the resolution shall be referred to committee, and, if not reported by the 75th day, shall be discharged and placed on the appropriate calendar. In the event that the resolution is received after the 75th day, it shall be referred to the calendar of the receiving House. The final vote shall be considered to occur on the resolution received from the first House to act on the same rule.

NFIB requests that the language of the Chairman's proposal in Section 805(e) be modified to read as follows:

> If, before the adoption by one House of Congress of an appropriate resolution with respect to a rule, that House receives an appropriate resolution with respect to the same rule from the other House, then the vote on final passage shall occur on the appropriate resolution from the other House. (New language indicated by underscoring.)

The NFIB believes that such modification will provide a better understanding of the procedure to be followed when either a resolution of approval has been approved in one House or a resolution of disapproval has been disapproved in one House and in turn is received in the other House, where until that time no action had occurred on the resolution.

Some opponents to this amendment have expressed concern over the use of approval/disapproval or inaction mechanisms and their effect on judicial review. The amendment states that Congressional inaction on or rejection of a resolution shall not be deemed an expression of approval or disapproval of a rule, and the enactment of an approval resolution for a major rule shall not affect the judicial review of the rule under Chapter 7 of Title 5 of the U.S. Code.

---

[7] Section 804(e) of Amendment No. 2655, 129 Congressional Record S17081 (daily ed. Nov. 18, 1983)(statement of Sen. Grassley).

NFIB is testifying today because we feel legislative veto is a congressional check on the regulatory process. NFIB supports the use of a joint resolution of approval for major rules combined with the use of a joint resolution of disapproval for non-major rules as the best alternative to legislative veto in view of the Chadha decision. Only through the approval mechanism can Congress have the tight control necessary over major regulations, for only under the approval approach is Congress assured of having the final say over whether or not a rule or regulation takes effect. While the disapproval mechanism provides some control, that control may often require a two-thirds vote by the Members of both Houses to be successful in halting a rule. The potential need for overriding a presidential veto tilts the balance of control in favor of the Executive Branch, which has the responsibility of presenting the rule. NFIB strongly believes that clearer congressional authority is necessary for major regulations.

The alternative legislative veto amendment combines a "report and wait" provision, the approval/disapproval mechanism and the expedited procedures provision to restore the rulemaking authority to Congress. Expedited procedures for both discharge from committees of jurisdiction and for floor consideration would keep the congressional review system from bogging down.

RESPONSES OF MS. DOUGLAS TO QUESTIONS OF SENATOR GRASSLEY

Question.

Would you please explain why the concept of a strong congressional review is so important to independent business people?

Answer.

Lacking the sophistication and the resources of large corporations, small, independent business owners embrace the concept of a strong congressional review as the simplest, most effective means of ensuring that agencies conform to the intent of Congress in the promulgation and implementation of rules and regulations. If an analogy can be made between Congress and the agencies vis-a-vis a business owner and employees, it would be that employers recognize the necessity of delegating various tasks to employees. Delegation of duties, however, is not the same as abrogation. An employee is assigned a task, and the employer bears the responsibility of ensuring the task is accomplished satisfactorily. The employer is ultimately accountable.

Similarily, Congress passes the laws, and the agencies implement them. Congressional review is the mechanism by which the lawmakers assure that the task of implementation is accomplished in an appropriate manner. Review assures accountability on two levels: agency personnel are accountable to Congress, and Congress is accountable to the public.

Question.

We appreciate the strong support of your organization of small businessmen and women, and your comments on the proposed congressional review procedures. Is there any other language you would advocate changing, such as specifying a time to begin collecting signatures on a petition to discharge a committee from consideration of an appropriate resolution? I understood you had some experience with a discharge petition in the House where a larger number of signatures have to be secured. Your concern that the procedures must be workable and realistic makes good sense, and we have not gone into much detail about changing the rules of the House of Representatives. Congressman Lott has been much more specific in his bill, H.R. 3939.

Answer.

The procedures established for bringing resolutions to the floor are important to ensure Congress the opportunity to exercise its authority. Given the number of signatures required in the House to discharge a resolution, a reasonable time period must be established for such collection of signatures.

We would urge that you give serious consideration to the procedures included in H.R. 3939, which address some of the concerns particular to the House of Representatives, and consider accepting these procedures for an effective expedited approach.

Senator **Grassley**. Mr. Perlman.

STATEMENT OF JEFF PERLMAN

Mr. **Perlman**. Senator, I am here this morning primarily to express Mr. Leighton's regrets that he is unable to attend. He has been detained in court in Texas, not as a defendant, however, I would like to add.

I would like to say, however, Senator, that on numerous occasions we have indicated our support for S. 1080. We do so again today. Earlier this year we sent a letter to Congressman Lott supporting the approach or indicating that we considered the approach offered by you, Senator Grassley, by Congressmen Lott, Broyhill, and Levitas, as being a very attractive route to take. Just sitting here this morning we have heard a number of witnesses come before you who have tremendous expertise on this issue. And it is very clear that there are merits to all of the approaches that have been suggested for legislative veto.

I think that one of the things the chamber of commerce would like to emphasize most strongly or urge you, Senator, and your committee is that we would like to be certain that everything that can possibly be done will be done to ensure that the trees, if you will—if we consider the legislative veto the forest, that the trees, meaning legislation such as the Federal Trade Commission, and the Consumer Product Safety Commission, legislation which all of the legislative veto debate is directed at, that we can do everything humanly possible to ensure that specifically those two pieces of legislation, which are basically the same on both sides of the Hill and which we believe have tremendous reforms for those two agencies, will get to the floor of the respective houses and be passed and reauthorized as soon as possible.

Thank you very much.

Senator **Grassley**. Thank you. Mr. Patterson.

STATEMENT OF DICK PATTERSON

Mr. **Patterson**. Thank you, Mr. Chairman. I will give you what is the conclusion of what was to be a longer presentation.

To put it as succinctly as possible, NAM wants to state its strong feelings that Congress should enact an omnibus regulatory reform bill, that Congress should have an opportunity to examine proposed rules and regulations under a generic form of review, should have an opportunity to act on them if the agencies do not correctly interpret what Congress intended or what the law says. In other words, they should be able to vote a proposed regulation up or down, but not amend it. Congress should ensure that the review process is as efficient and as swift as possible. For that reason we feel that a resolution of disapproval best meets that criteria for a generic mechanism.

There may be unique circumstances necessitating a different approach for specific agencies, specifically for the FTC reauthorization under S. 1714. NAM supports Senator Kasten's proposed amendment to that bill which would create a congressional disapproval mechanism for FTC rules. We hope the debate over legislative veto does not delay the passage of S. 1714. Other agencies may require resolutions of approval but that should, in our opinion, be on a case-by-case basis.

Continuing, we feel that Congress should ensure that minority voices cannot impede or stop the congressional review process and that Congress should ensure that the judicial review of rules and regulations is not adversely impacted. In other words, does not preclude or prejudice judicial review or impair due process.

We, also, would urge Congress to ensure that first amendment rights to petition Congress are not abridged; that is, contact re a proposed legislative veto action should not be prohibited or considered to be ex parte.

That is, in a nutshell how we feel about a generic review mechanism. And we would obviously be willing and anxious to answer any questions you may have.

[Material submitted for the record follows:]

PREPARED STATEMENT OF NATIONAL ASSOCIATION OF MANUFACTURERS

Presented by Dick Patterson

The National Association of Manufacturers (NAM) submits herein its views on Senator Grassley's amendment to S. 1080 to provide a constitutional method for congressional review of agency rulemaking. The NAM represents the broad interests of American industry with over 13,000 members ranging in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500.

The NAM supports the establishment of a generic review provision enabling the Congress to check agency rules and regulations for the protection of the public interest. And we believe it is wholly appropriate for the Congress to consider such a provision along with procedural reform legislation as embodied in S. 1080.

The establishment of a generic review provision with applicability to all agency rulemaking is needed in order for the Congress to retain accountability for the rulemaking process. Since unelected agency officials are not accountable to the public for their decision-making, such a provision would help ensure that the intent and will of the Congress is expressed in the writing of rules and regulations.

With the Supreme Court's Chadha decision nullifying the legislative veto, there is a consequent imbalance to the oversight capability of the Congress that can only be restored by the enactment of legislation establishing a generic review provision. Obviously, the structuring of the review provision must satisfy all the constitutional tests imposed by Chadha, including the presentment requirement.

The NAM views the establishment of a generic review provision as serving the principle of regulatory reform. However, it is but one of three reform initiatives that need to be taken by the Congress. We refer specifically to the passage of procedural reform legislation, such as S. 1080, that is applicable to all agencies and the review and possible modification of the underlying, substantive regulatory statutes. Enactment of a generic review provision would not negate the need for the Congress to address these other important reform matters.

In considering the mechanics of a generic review provision the Congress should be mindful that the real benefit of a review provision is the threat of disapproval it imposes on agency rulemaking. We see the review process as providing an incentive to the agencies to improve the quality and soundness of their decisions. It would encourage agencies to base their rules on the best available information and to strive to make rules as efficient and cost-effective to the public as possible.

A fundamental requirement of the generic review provision, as noted in Chadha, is that it involve deliberate action by both houses in order to stop a rule from taking effect. The requirement of two house action is useful because it discourages the politicization of the review process and is consistent with bicameralism. Finally, such a requirement may make the review provision less susceptible to challenge in the courts. The NAM does not support the so-called "one and one-half house veto" that operates with inaction or the lack of deliberate action by one house in considering a resolution of disapproval.

NAM submits that the establishment of a generic review provision need not be viewed as the last word of the Congress in checking agency rulemaking. It may be appropriate for the Congress to add binding review provisions to individual statutes where it can be determined that such a provision is workable and serves the public interest. Because of this possibility and for many other reasons the NAM believes the resolution of disapproval deserves serious consideration as the operative mechanism in a generic review provision. A resolution of disapproval may be more acceptable to the Congress and may be viewed as less burdensome to the legislative process.

Senator Grassley's proposed joint resolution of approval, requiring congressional action to make a rule effective, has considerable merit and appears to be a stronger and more determinative action. Consequently, we view the resolution of approval as an approach particularly well-suited for those individual statutes that deserve closer scrutiny.

Another fundamental requirement of the generic review provision should be that the process operate within an acceptable time frame. Congress should be concerned with avoiding undue delay when reviewing agency rules and regulations. Senator Grassley's amendment to S. 1080 provides for a maximum period for congressional deliberation of 90 days and is sufficient to meet this concern. Some groups oppose the establishment of a generic review provision by contending that the process will disserve the public by delaying the effectiveness of rules and regulations. Again, the NAM believes that the 90-day period does not conflict with the public interest. In fact, public access to the regulatory system is complemented by the establishment of a generic review provision.

With respect to other mechanics of the review provision, the NAM believes that Senator Grassley's amendment balances the considerations of fairness and public responsibility by providing for the review of a rule by the originating committee of jurisdiction and for strict adherence to a reasonable time frame for completed action. The mechanism in Senator Grassley's amendment that would forcibly discharge a committee from consideration of a resolution does not preempt the committee process nor the ability of the Congress as a whole to fairly consider the merits of an agency rule.

Some groups oppose the establishment of a generic congressional review provision because of its implications for judicial review. Such implications are at best arguable and a matter for speculation and must be resolved ultimately in the courts. The right to judicial review of a rule or regulation would not be affected and no prejudice or advantage to the judicial review rights of individuals would arise by the simple enactment of a generic review provision. Clearly defined appellate rights and due process considerations are deeply rooted in the practice and establishment of administrative law. Consequently, the notion that congressional review of a rule could limit the scope of judicial review cannot be substantiated.

However, it is quite possible for the Congress to write language in structuring the generic review provision that is intended to limit the scope of judicial review with respect to matters arising from this activity. We believe that the public is best served by the Congress not addressing judicial review when fashioning the generic review provision for rulemaking. The two subjects are more appropriately considered in separate contexts and the public derives greater benefit and flexibility from leaving the law on judicial review where it stands.

Other groups oppose the establishment of a generic review provision because of its potential ill effects on the Administrative Procedure Act and the rulemaking process in general. These groups contend that the possibility would exist for the Congress to tamper with rulemaking at the inception stage, thus distorting the development of regulatory policy and denying the public access to that process. We believe that the law on ex parte contacts is well developed and sufficient to protect against congressional infringement into the rulemaking process or other abuses of power.

Congress should be more specific in directing the regulation of private sector activities and less inclined to delegate this authority to the discretion of unelected agency officials. Since regulation is so pervasive in our society, good public policy calls for protection against abuses or improprieties in the writing of rules and regulations. Regulatory policy should be as important to the Congress as budget policy and tax policy insofar as decisions in these different policy areas are of equal significance to the American people.

Despite the expertise at the agency level, agency officials should not alone decide whether and how to regulate. These decisions should be reserved for the Congress. Once these decisions are made, the agencies should then be required to implement them in the most cost-effective and efficient manner that is consonant with the public interest.

In summary, the NAM supports Senator Grassley's amendment to S. 1080 with the exceptions noted herein and we are committed to working with the Senator and his colleagues to achieve passage of the legislation in the 98th Congress.

RESPONSES OF NAM TO QUESTIONS OF SENATOR GRASSLEY

Question 1. I would like to take a moment and refer to Jerry Jasinowski's op-ed piece which appeared recently in the Washington Post. In that article NAM's Executive Vice President lays out seven steps to get regulatory reform moving again. What he says makes a lot of sense except for his last comment that, and I quote, "in the wake of *Chadha* Congress must critically reexamine its self-appointed role of messiah and traffic cop."

Can you enlighten us on just what Mr. Jasinowski meant by that. I fail to understand his view of Congressional oversight. It seems clear to me that this so-called self-appointed "messiah" role comes from the Constitution, not thin air. Does he or NAM think legislative power should be freely delegated away to bureaucracies without checks. Perhaps when Mr. Jasinowski served as an Assistant Secretary of Commerce in the Carter Administration he felt obligated to answer to the people of Iowa, however I doubt it. I in turn must answer to those people.

That's the difference in the position of the Executive relative to that of Congress. We as legislators are directly accountable to our constituencies. The nature of that accountability is totally different when we are examining the executive branch.

I'd also like to take this time to advise certain elements of the business community that Congressional oversight mechanisms carry the issue of regulatory reform in the House—it's not the other way around and the sooner they recognize the fact the sooner we can move this legislation. Legislative veto is the engine that pulls regulatory reform in the House.

Answer. In metaphorically referring to Congress as both a messiah and a traffic cop, Mr. Jasinowski was acknowledging the business community's conflicting impressions of Congress in delegating and checking the authority of the agencies to regulate private sector activities. We underscore the basic point that is made by Mr. Jasinowski in page 6 of our hearing statement:

Congress should be more specific in directing the regulation of private sector activities and less inclined to delegate this authority to the discretion of unelected agency officials. Since regulation is so pervasive in our society, good public policy calls for protection against abuses or improprieties in the writing of rules and regultions. Regulatory policy should be as important to the Congress as budget policy and tax policy insofar as decisions in these different policy areas are of equal significance to the American people.

What we seek is a balance to these conflicting roles and we believe that Congress must take the initiative to secure this balance. Essentially, Sen. Grassley and Mr. Jasinowski are saying the same thing—the Congress has a constitutional obligation to retain accountability for rulemaking in protection of the public interest.

Question 2. You refer in your testimony to one and one-half house veto proposals and that NAM does not support those. I am unaware of any such proposals currently being considered by Congress. Are you referring to a specific approach?

Answer. At the top of page 3 of our hearing statement we conclude our discussion of the need for two-House deliberate action to operate a generic review provision by citing, as an example, a provision that does not meet this requirement, the so-called "one and one-half house veto." We are merely referencing a review provision that arguably could meet the requirement, but in our estimation, does not. Consequently, we would oppose the establishment of a "one and one-half house" generic review provision.

Question 3. You state that the approval approach might be "particularly well suited for those individual statutes that deserve closest scrutiny." I can think of no other rules which should be subjected to closer scrutiny than if they are determined to have an impact on society of $100 million.

If you think the problem lies in workload it's safe to assume that we will probably only be dealing with about 50 rules a year and it seems that Congress is willing to take on this added burden as evidenced by the 238-177 vote on the CPSC authorization bill. What I am trying to get at is, shouldn't Congress be the one to decide how much work it can handle and shouldn't your concern be limited to the substance of the proposal?

Answer. At the top of page 4 of our hearing statement we say that a resolution of approval may be "particularly well suited for those individual statutes that deserve closer scrutiny." We do not mean to preclude the possibility that a great number of statutes may deserve close scrutiny or that any certain number of laws fit that description. Rather, we are suggesting that the resolution of approval compares with the resolution of disapproval as a stronger and more determinative action by the Congress and so may involve more careful consideration. Our substantive concerns with a resolution of approval are: (1) the act of approving agency rules and regulations within a given policy area can have the long-term effect of building a legislative record of support for that policy that could deter efforts by the business community or any other public group to effect legislative changes to that policy; (2) the business community finds itself more often than not in a defensive posture with respect to agency rulemaking and, upon that basis, our needs for accessing the Congressional oversight of rules appear to be better addressed by the resolution of disapproval; and (3) although we say at page 5 of our hearing statement that it is unreasonable to oppose the establishment of a generic review provision because of its implications for judicial review, nevertheless, again, because of our traditional defensive posture, we are concerned that the affirmation of a rule by the Congress could be used effectively against business interests, in the event a business community member seeks review of an approved rule in court. Let me say that these three substantive concerns are only identified for the purpose of providing clarification as to why NAM is unable at this time to support unequivocally the establishment of a generic resolution of approval. As we concluded in our hearing statement, we are prepared to work with Sen. Grassley to bring S. 1080 to the floor and achieve passage of this important reform legislation in the 98th Congress.

Senator GRASSLEY. Mr. Kennedy.

STATEMENT OF CORNELIUS KENNEDY

Mr. KENNEDY. Mr. Chairman, it is an honor and a pleasure to appear before you today with respect to the amendment to S. 1080 which we are considering. And I too will be brief.

As the committee is aware and as you have noted, I served as a member of the council and then chairman of the American Bar Association Section on Administrative Law. I am presently chairman of its committee on rulemaking. I also served five terms as a public member of the Administrative Conference and chairman of its committee on rulemaking during most of that period. And I am now a senior fellow of the conference. I am also a member of the American Law Institute and a fellow of the American Bar Foundation. And I want to emphasize that the testimony I give today will be my own views and that I do not appear as a representative of any of those organizations.

I want to commend you for this hearing and for looking carefully at this important topic. It is important to the national day to day execution of national policy set by the Congress and it is timely as we approach the 200th anniversary of our Constitution.

I am not as concerned by the broad language of the *Chadha* case as some of the speakers who preceded me. You will recall, as I do, that in *Marbury* v. *Madison,* the Chief Justice then, Marshall, made some broad statements on separation of functions. And then a few years later in the *Cohen* case he took them back saying that broad statements must be limited to the particular issue that arose in that case.

In the *Cohen* case he set aside much of the breadth of his statements in *Marbury* v. *Madison.*

In brief, the point that I wish to emphasize flows very directly from the point that you made when you introduced the amendment; who shall write the laws of the land? And I want to focus that more narrowly by asking: Is a rule promulgated by an administrative agency a law of the land? And the answer is simply that it is not and it cannot be. It is executive action. And it is subject to congressional review in the same fashion that Congress reviews any other executive action.

There is no doubt under the Constitution that an executive agency or even the President cannot write a law. The best he can do is make proposals to the Congress and that is what your proposed amendment would provide.

The only powers the President has, absent congressional action of some sort under our Constitution, are his actions as commander in chief, his power to grant pardons and reprieves, and his power to receive ambassadors. In all other respects, he is required to take care that the laws passed by Congress are faithfully executed.

Similarly, our Founding Fathers denied the judges, however wise and able they felt the judges were, the power to make laws or to participate in the lawmaking process, and they even denied them the power to develop the Federal common law by limiting basically the Federal jurisdiction of the article III courts to cases arising under the Constitution and the laws which Congress has passed.

I want to emphasize that this decision was not a flash of genius in 1787 at the Constitutional Convention. Instead, it was built on a very sound foundation of almost 175 years of development of the concept of self-government in the colonies prior to that time because the colonies had had an unprecedentedly large degree of self-government. It was not until the mid-1700's that the English Government attempted to control anything more than their foreign policy and foreign trade.

As early as 1641, for example, and I will develop this at greater length in my written statement, the Massachusetts Body of Liberties, in order to ensure that there was a separation of the lawmaking function from execution of the law and the enforcement of the law, provided that nobody could be penalized under color of law or countenance of authority unless it be by virtue or equity of some express law of the colony, warranting the same, adopted by the assembly, and sufficiently published.

So we must look at agency rules within that framework. The difficulty arises when people say or assume that agencies have been granted the power to state what the law is as if it was the legislature speaking. That is not true And yet it has been the cause of much of our problem. That problem was so great that even as early as 1937, just about 30 years after the ICC was first granted the rulemaking power, President Roosevelt's Commission on Administrative Management said that these administrative agencies with rulemaking powers are in reality miniature, independent governments, which gives rise to evils which are insidious and far reaching.

In fact, President Roosevelt himself added in his letter of transmittal that agencies of the Government having rulemaking powers threaten to develop into a fourth branch of the Government for which there is no sanction in the constitution.

Yet, even today, judges, legislators, professors, and many others appear dedicated to the idea that when an agency issues a rule it is speaking as the legislative body. Just 2 days ago when I was working on my testimony for this hearing I received a letter from a professor of law who was formerly dean of the Minnesota Law School, now teaching in California and will be teaching at Oxford this summer, in which he said, by making rules the agency makes laws as the legislature does.

In considering your amendment, we must abandon that concept. Your amendment correctly provides that an agency rule should be considered only a recommendation of the agency to Congress and shall have no force or effect as a rule unless such rules become effective in accordance with procedures set out in your amendment.

If the agency does not wish to go that route, it can go the individual enforcement route.

And let me finally touch, very briefly because of the time, on how that works. The Sherman Act is one of our most effective regulatory statutes. It is also one of our oldest. It is very brief. It provides simply that monopolies and restraints of trade are illegal. Now, if the Attorney General decides that 19 percent of a market share is not a monopoly and declines to prosecute, that is an executive policy decision.

If he decides that 20 percent share of market is a monopoly and proceeds to prosecute, that is an executive decision. Similarly, the Federal Trade Commission has responsibilities under the Sherman Act. And if it by rule provides 19 percent share of the market is not a monopoly, but 20 percent share of the market is, that rule really occupies the same structural place in our Government as the decision of the Attorney General to prosecute or not. It does not speak as the legislative body is speaking.

If the Attorney General or the Federal Trade Commission wish to have Congress approve and put its imprimatur on that decision of what share of the market constitutes the monopoly, it should come to the Congress, as your amendment suggests and would require.

The Supreme Court early on when the Interstate Commerce Commission was first granted this rulemaking power, I think most correctly characterized that power. And we are dealing, I want to emphasize, with an independent agency, not merely an executive agency. It said that a court on judicial review must consider not only all relevant questions of constitutional power or rights and all pertinent questions as to whether the administrative rule was within the scope of the statutory authority under which it purports to be made, but—and this is important—a proposition which we state independently, although in its essence may be contained in the previous proposition, namely whether even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein because the exertion of authority which has been questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of power.

In other words, the Supreme Court refused in 1910 to consider that a rule issued by an independent agency had the status of a legislative pronouncement; it said that it must be tested by whether it was within the authority given to the agency to act in an executive fashion.

If we adopt that premise, then it is much simpler to view this whole area of controversy because Congress is not overriding a legislative pronouncement by an agency when it approves or rejects a rule. I commend the committee for doing what it is doing because it is, I think, consistent with the thought that we must jettison the idea that agency rulemaking speaks as the legislature speaks.

I thank you.

Senator GRASSLEY. Well, thank you. I may submit questions to you in writing. I want to thank you very much. We had some variation on this panel, and I would have liked to have discussed that variation of positions, however, I have a commitment that cannot be postponed.

I commend each of you and your organizations for the efforts that you are putting forth in regard to this proposal. Thank you very much, as well as the other witnesses and attendees at the committee meeting.

Meeting adjourned.

[Whereupon, at 12:28 p.m., the subcommittee was adjourned.]

○